SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 244

LEONA ANDERSON MAY,

Appellant,

vs.

OWEN ANDERSON

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

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IN THE SUPREME COURT OF OHIO

No. 32980

APPEAL FROM THE COURT OF APPEALS OF COLUMBIANA COUNTY, OHIO

OWEN ANDERSON,

Plaintiff-Appellee,

vs.

LEONA ANDERSON MAY,

Defendant-Appellant

JURISDICTIONAL STATEMENT

This jurisdictional statement supports a petition for appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Ohio in *Anderson* v. *May* (1952), 157 Ohio St. 436, 105 N. E. 2d 648. It and the accompanying petition for appeal and assignment of errors have been duly filed with the Clerk of the Supreme Court of Ohio and are presented for allowance on July 1, 1952, being within 90 days after the denial by the Supreme Court of Ohio on April 23, 1952 of appellant's application for rehearing (25 *Ohio Bar* 273).[1] 28 U.S.C., § 2101(c).

[1] The Supreme Court of Ohio rendered its judgment adverse to appellant on April 2, 1952 (25 *Ohio Bar*, pages 198 and 199). Rule XX of the Supreme Court of Ohio (147 Ohio St., lxxv) authorizes the filing of an application for rehearing within 14 days. On April 16, 1952, in order to exhaust her State remedies, appellant duly filed an application for rehearing. As stated in the text, it was denied on April 23, 1952 and the judgment of the Supreme Court of Ohio thereupon became "final".

Gypsy Oil Company v. *Escoe* (1927), 275 U.S. 498, 72 L. Ed. 393, 48 S. Ct. 112.

NATURE AND HISTORY OF CASE

This case originated in the Probate Court of Columbiana county, Ohio on July 5, 1951, as a habeas corpus action by Owen Anderson, father of Ronald, Sandra and James Anderson, minors under 14, to obtain possession of said children from their mother, the appellant Mrs. May. It was brought to enforce against her, *in Ohio*, a purported *Wisconsin* award to plaintiff Anderson of the children's custody, made in a Wisconsin divorce case also brought by plaintiff Anderson.

The Issue

Habeas corpus is a strictly "legal" remedy in Ohio. *Ohio General Code*, § 12161.[2] And, in Ohio, a mother's "legal" right to possession of her children is "equal" to their father's. *Ohio General Code*, §§ 8032[3] and 10507-8 (114 Ohio Laws 385).

Thus, since habeas corpus cannot in Ohio be used to determine chancery questions concerning the welfare of children, and since nothing short of a valid judicial award of children's custody to one of their parents can give that parent a "legal" right to possession of his children

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[2] All citations to the *Ohio General Code* are citations to the official "General Code of Ohio of 1910", with the following exception: Where the section number is followed by a citation to the official "Laws of Ohio", cited thus, "— Ohio Laws —", the section is more recent than 1910 and will be found in the *Laws of Ohio* in the volume and at the page indicated.

[3] § 8032 became § 8005-3 in a recodification of the domestic relations laws of Ohio effective August 28, 1951, after the beginning of this litigation. (124 *Ohio Laws* 195.)

superior to the "legal" right of the other parent, the only purpose for which habeas corpus can be used between parents in Ohio is the purpose for which it is employed here, namely, to *enforce* a purported prior award to the plaintiff parent of the children's custody; and the only issue possible is the *issue* here, namely, the *validity* of the purported prior award. *In re Corey* (1945), 145 Ohio St. 413, 61 N.E. 2d 892. Cf., *Finlay* v. *Finlay* (1925), 240 N.Y. 429, 148 N.E. 624, 40 A.L.R. 937. But see *New York ex rel. Halvey* v. *Halvey* (1947), 330 U.S. 610, 91 L. Ed. 1133, 67 S. Ct. 903.

Hence, the concurring opinion in the Court of Appeals of Columbiana county to the contrary notwithstanding,[4] the question of what custody award the welfare of the children in this case requires, not only *was not* tried in this case, but, to appellant's regret, it *could not* be tried in this case. The sole issue that *could* be tried, and the only issue that *was* tried, was the validity of the purported Wisconsin

[4] The Presiding Judge of the Court of Appeals dissented from the majority's holding that the Wisconsin court had jurisdiction, but concurred in affirming the judgment of the Probate Court on the ground that the Probate Court's judgment was in effect an award of custody to the father and that the "evidence" showed such an award to be "for the best interests of the children."

As is evident from the text, no evidence was admissible on any such subject. None was admitted! As the trial court states in its opinion (R. 25):

> "In passing it might be stated that this entire Habeas Corpus proceeding is based upon the Wisconsin decree of divorce, granting custody and control of said children to the father, or Petitioner, in this case."

And, although the reporter did not take it, the trial court explicitly warned counsel that the pleadings raised but one issue, namely, the jurisdiction of the Wisconsin court to make the purported custody award in question, and that they were to confine themselves to it. Since the issue of the children's welfare was not tried, it is unfair to plaintiff Anderson to draw any inference as to that issue from evidence that came in on other issues, although the fair inference, if any were to be drawn, would certainly be the opposite of that stated in said concurring opinion.

award and its consequent title, or lack of title, to "full faith and credit" under Article IV, § 1 of the Constitution of the United States.

Summary of Facts

The following facts pertinent to the validity of the purported Wisconsin award are undisputed:

Originally, the parties and their children lived in Wisconsin, where the mother and children had been born. The mother removed to Ohio with the children. Admittedly, she thereupon became (and still is) domiciled in Ohio. Subsequently, plaintiff Anderson filed his divorce case in Wisconsin. Throughout the Wisconsin case, the children were living and physically present with their mother in Ohio. There was no service of any kind on the children, who were not made parties, and only substituted service on the mother, had by handing her a Wisconsin summons in Ohio. There was no appearance in the Wisconsin case by either the mother or the children.

Reserved Questions in Halvey Case, Supra

This case thus presents two of the questions reserved by the Supreme Court of the United States in the *Halvey* case, *supra* (330 U.S., 615-6, 91 L. Ed., 1136, 67 S. Ct., 906-7), namely:

First, can a court have jurisdiction to award a child's custody when the child is outside the State at the time the court enters its decree and the court has jurisdiction neither of the child's person nor the person of the parent who has the child with him outside the State?

Second, there having been only constructive service on the parent who has the child outside the State, is that parent in any way bound by the custody decree?

Holdings of the Courts Below

The trial court, which each intervening court has either expressly or in effect affirmed, answered both the foregoing questions in the affirmative, an answer contrary to the answer seemingly indicated by the first two of the three concurring opinions in the *Halvey* case, *supra*.

The specific grounds on which the trial court sustained plaintiff Anderson's demand for "full faith and credit" for the purported Wisconsin award are these:

It held that mere "domicil" of a child or incompetent in a State, *of itself and without more*, gives the courts of that State jurisdiction to award his custody, even though he is physically present in and thus within the sole power of another State or country hundreds or thousands of miles away! Next, the trial court held that § 7996,[5] *Ohio General Code*, vests legal power to control the domicil of the children of a marriage exclusively in the husband and father and denies the children's mother the power to affect or alter her children's domicil in any way without their father's authority and consent.

It then found as a fact (R. 30, 82)[6] that plaintiff Anderson did not consent to or authorize a change in the children's domicil from Wisconsin to Ohio.

It is evident that, if the two holdings set forth above were correct, it would follow from said finding of fact that the children's domicil remained in Wisconsin, that the Wisconsin court had jurisdiction to award their custody as it saw fit, and that its purported award was valid and

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[5] "§ 7996. The husband is the head of the family. He may choose any reasonable place or mode of living and the *wife* must conform thereto."

[6] Throughout, the record page references are to the pages of the transcript of the record prepared by the Clerk of the Supreme Court of Ohio to forward to the Clerk of the Supreme Court of the United States.

entitled to "full faith and credit." The trial court so found and granted enforcement of said purported award, ordering Mrs. May, in whose custody the children had been remanded at the outset, to deliver them to plaintiff Anderson.

Federal Questions Were Raised

In holding that the bare "domicil" of a person within a State gives its courts jurisdiction to adjudicate him to be a minor or incompetent and make an order purporting to commit him to custody—even where he is outside the State and its courts have jurisdiction neither of his person nor of the person of the individual, if any, in whose custody he is—the trial court sustained a contention by plaintiff Anderson.

Mrs. May had opposed this contention strenuously, urging that any such proposition must, of necessity, rest on doctrines unknown to the law of a free country, and violate principles of public law respecting the jurisdiction of courts, generally accepted in the Western world, that are deeply embedded in the Federal Constitution. Specifically, she contended that she and the children alike are constitutionally immune to any extension of "full faith and credit" to the purported Wisconsin award for the reasons:

(1) That it is implicit in Article IV, § 1 that "full faith and credit" is due a judgment or decree only if, according to the principles just mentioned, it has been made "*with* jurisdiction" (possibly because, otherwise, the proceedings in which it is made are not truly "judicial"). *D'Arcy v. Ketchum* (1850), 11 How. 165, 13 L.ed. 648. *Thompson v. Whitman* (1874), 18 Wall. 457, 21 L.ed. 897. *Pennoyer v. Neff* (1878), 95 U.S. 714, 24 L.ed. 565.

(2) That any construction of Article IV, § 1 to require "full faith and credit" for said purported award when

made *without* jurisdiction, according to those principles, would render Article IV, §1 repugnant to the 5th Amendment, which protects both Mrs. May and her children from being deprived by Federal action of their liberty without due process of law. And

(3) That by enforcing against her and the children a decree which, according to civilized principles of jurisdiction, was made without jurisdiction, *Ohio* would deprive her and the children of their liberty without due process of law, contrary to the 14th Amendment. *Pennoyer* v. *Neff*, above. *Griffin* v. *Griffin* (1945), 327 U.S. 220, 228-9, 90 L.ed 635, 640, 66 S.Ct. 556, 560.

Mrs. May likewise argued strenuously that if §7996 *Ohio General Code* were construed to take from her the legal power to alter her children's domicil without plaintiff Anderson's authority and consent, it would, as thus construed and applied, violate each and every provision of §1 of the 14th Amendment.

The arguments in the trial court are of course not part of the record. *Before* judgment in that court, however, the substance of Mrs. May's foregoing contentions was reduced to record as Mrs. May's exception 4 to the trial court's separate findings of fact and law (R. 77-82) as follows (R. 83-4):

> "Defendant Leona Anderson May excepts * * * (4) To the findings of law contained in paragraphs b, c and e, and to the portion of the findings of law contained in that part of paragraph d that begins with the words "The plaintiff husband in this case" and continues to the end of said paragraph d, on the ground that they are contrary to law, involve an erroneous application to this case of Article IV, §1 of the Constitution of the United States, are repugnant to the 5th Amendment and §1 of the 14th Amendment to said Constitution, and so construe and apply General Code §7996 as to

render that statute repugnant to said § 1 of said 14th Amendment." (R. 83-4).

The trial court overruled said objections by entering judgment against Mrs. May (R. 113).

After judgment in the trial court, Mrs. May renewed said objections by a motion for new trial (R. 85-6), which the trial court overruled (R. 86). The wording in the motion for new trial was virtually identical with that just quoted, except that the objections were now directed also to "the judgment of the Court, which is based on said findings".

The Court of Appeals

From the Probate Court, Mrs. May appealed to the Court of Appeals of Columbiana county, Ohio. There she raised said objections at the outset in her assignment of errors (R. 106). The assignment of errors copies almost verbatim the language already quoted above from Mrs. May's exceptions and motion for new trial. The Court of Appeals overruled said assignments of error by affirming the judgment of the Probate Court (R. 100).

The Supreme Court of Ohio

Mrs. May appealed from the Court of Appeals to the Supreme Court of Ohio both of right, on the ground that Federal constitutional questions were involved, and also on condition that a "motion to certify" (a discretionary remedy similar to certiorari) be allowed by said court (R. 99). Mrs. May again raised said constitutional objections at the outset in her assignment of errors (R. 95-6), of which the pertinent portions read as follows:

> "3. The Court of Appeals misconstrued and misapplied § 1 of Article IV of the Constitution of the United States, and, further, so construed and applied said section as to render the same repugnant to the 5th

Amendment and to §1 of the 14th Amendment to said constitution; and, in doing each, the court erred.

"4. The Court of Appeals erred in that its judgment in this case is repugnant to § 1 of the 14th Amendment to the Constitution of the United States, and, further, in that said judgment sustains a construction and application by the Probate Court of §7996 (now §8002-2) of the Ohio General Code that renders said statute repugnant to said §1 of said 14th Amendment."

On March 27, 1952, the case was heard before a full bench consisting of six Judges and the Chief Justice.

On April 2, 1952, with three judges—Stewart, Taft and Zimmerman, J.J.—not concurring,[7] the Supreme Court of Ohio passed on Mrs. May's said assignments of error by dismissing her appeal of right on the ground that "no debatable constitutional question is involved." 25 *Ohio Bar* 198. *Anderson* v. *May* (1952), 157 Ohio St. 436, 105 N.E. 2d 648. The court also overruled Mrs. May's motion to certify. 25 *Ohio Bar* 199.

On April 16, 1952, within the fourteen days allowed by Rule XX of the Supreme Court of Ohio (147 Ohio St. lxxv), Mrs. May exhausted her state remedies by duly filing an application for rehearing, which, on April 23, 1952, was denied. 25 *Ohio Bar* 273.

As previously stated, the children were remanded in Mrs. May's custody at the outset. (See appendix, page 39 below.) The judgments of the trial court and Court of Appeals requiring her to surrender the children to plaintiff Anderson were at once superseded by filing proper supersedeas bonds. The Supreme Court of Ohio has graciously stayed the issuance of its mandate to allow the perfecting of this appeal. The children therefore remain in Mrs.

[7] The Supreme Court of Ohio admits a case only if an absolute majority of the members sitting votes to admit.

May's custody under the trial court's preliminary order pending the action of the Supreme Court of the United States.

STATUTES BELIEVED TO SUSTAIN JURISDICTION

The statutes believed to sustain the jurisdiction in this case of the Supreme Court of the United States are the following, each of which is quoted from Title 28, *United States Code:*

> "§1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."
>
> "§2103. If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State in a case where the proper mode of review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted upon as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. * * *"

(The attorneys for Mrs. May believe, as will appear, that the jurisdiction on appeal is clear. That, however, does not excuse them from claiming for her the benefit if needed of the important curative statute last quoted.)

JURISDICTIONAL QUESTIONS; AUTHORITIES CITED

I. Judgment of Highest State Court?

A judgment of the Supreme Court of Ohio dismissing an appeal of right on Federal constitutional questions on the ground that "no debatable constitutional question is involved" is a judgment of the highest court in Ohio "in which a decision could be had" and, if final, is reviewable by the Supreme Court of the United States. *Tumey* v. *Ohio* (1927), 273 U.S. 510, 71 L.ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243. *Van Huffel* v. *Harkelrode* (1931), 284 U.S. 225, 76 L.ed. 256, 52 S.Ct. 115, 78 A.L.R. 453. *Haley* v. *Ohio* (1948), 332 U.S. 596, 92 L.ed. 224, 68 S.Ct. 302.

II. A Final Judgment?

The Probate Court rendered judgment against Mrs. May for the surrender of the children to plaintiff Anderson. Said judgment left nothing further to be done and concluded the litigation. It was therefore "final." *Radio Station WOW, Inc.* v. *Johnson* (1945), 326 U.S. 120, 89 L.ed. 2092, 65 S.Ct. 1475.

The effect of the judgments of the Court of Appeals and the Supreme Court of Ohio being simply to confirm the judgment of the Probate Court, they also would seem clearly "final."

III. "Right, Privilege or Immunity" Claimed?

As we have seen, the issue in this case is whether the purported Wisconsin award of the custody of the children in this case is valid and therefore entitled, under Article IV, §1 of the Federal Constitution, to "full faith and credit" and enforcement in Ohio. The issue arose as follows:

Invoking Article IV, §1, plaintiff Anderson produced the purported Wisconsin award and demanded "full faith and

credit" for it. Mrs. May, quite apart from her complaint against §7996, *Ohio General Code*, defended on the ground that she and the children were immune to any extension of "full faith and credit" to said purported award because, according to principles (a) implicit in Article IV, § 1 itself, (b) imposed on the United States by the 5th Amendment and (c) imposed on both Wisconsin and Ohio by §1 of the 14th Amendment, the purported award was made without jurisdiction and was therefore void.

Thus, from the start, each of the parties has claimed a "right, privilege or immunity" under the Federal Constitution. It is believed, therefore, that even if the validity of a State statute were not involved, the Supreme Court of the United States would have jurisdiction at least to grant certiorari.

IV. Validity of a State Statute Drawn in Question?

As previously shown, Mrs. May has in every court attacked the validity of §7996, *Ohio General Code*, on the ground that, as construed and applied in this case, it is repugnant to §1 of the 14th Amendment. The statute reads as follows:

> "§7996. The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto."

The official publication of this statute is in the General Code of Ohio of 1910, page 1702. In a recodification of the domestic relations laws of Ohio, effective August 28, 1951 (after the beginning of this litigation), it became §8002-2, *Ohio General Code*. 124 *Ohio Laws* 183.

V. Judgment "in Favor of" Validity?

As already pointed out, the State judgment is that §7996, above, deprived Mrs. May of the legal capacity to change her children's domicil from Wisconsin to Ohio, that,

because of this, the children's domicil remained in Wisconsin, and that because their domicil remained in Wisconsin, Wisconsin had jurisdiction to make its purported award of their custody.

Had the Ohio courts held §7996 invalid, or even construed it differently, they would have been forced to find that the children were domiciled in Ohio, not Wisconsin, during the pendency of the Wisconsin case, that Wisconsin was thus without jurisdiction, and that its purported custody award was therefore void and entitled to no faith or credit whatever—which would have led to the opposite result from the one reached.

Thus the decision of the Ohio courts was a decision "in favor of" the validity of §7996, Ohio General Code.

Jurisdictional Questions; Conclusion

For the foregoing reasons, it is urged that all purely technical requirements for jurisdiction are satisfied. We therefore turn to the inquiry whether the Federal questions involved are substantial.

SUBSTANTIALITY OF FEDERAL QUESTIONS

Exact Scope of Questions

The "domicil" or "legal settlement" of a person, the place of which he is an "inhabitant", is presumably the place where he "resides" within the meaning of the first sentence of the 14th Amendment:

> §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they *reside*."[8]

Because of the ambiguity of "residence", it is "domicil" that is used throughout this statement to mean this con-

[8] *Milliken* v. *Meyer* (1940), 311 U.S. 457, 463-4, 85 L. ed. 278, 283-4, 61 S. Ct. 339, 343.

nection with a State which, in the case of a citizen of the United States, makes him a citizen of the State also and gives the State such jurisdiction of him as arises out of his consequent allegiance to it.

This mention of the effect of domicil on State citizenship and allegiance is made here because the recent decision of the Supreme Court of the United States in *Harisiades* v. *Shaughnessy* (1952), 342 U.S. 580, 72 S. Ct. 512, may affect sharply the jurisdictional significance of "domicil" when considered by itself:

The jurisdictional import of "domicil" in a context such as this[9] appears to have rested wholly on an assumption that, when a person makes his home in a State or country and it permits him to remain there, he thereby undertakes allegiance to it[10] and it thereby accepts his allegiance, an allegiance qualified only by his continuing technical allegiance to the country of which he is a citizen or subject. In a country where this assumption is true, it follows that the country acquires (subject to the qualifications implicit in the qualification just stated) the same rights, jurisdiction, and duties with respect to him, including the duty of protection, as it has in the case of its nationals.

The *Harisiades* case, however, appears to hold, quite flatly, that by acquiring a domicil here, a non-citizen acquires no more rights and incurs no more obligations than does a

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[9] As is evident, what we are concerned with in this case is jurisdiction to adjudicate alleged minors and incompetents to be such and commit them to custody—a matter of exclusively common law and chancery cognizance. We are in no way concerned with the utterly alien principles of the canon law that govern jurisdiction in divorce and jurisdiction to probate wills and grant letters testamentary and of administration.

[10] As is made clear by *Blackmer* v. *United States* (1932), 284 U.S. 421, 76 L. ed. 375, 52 S. Ct. 252, and by the comments on it in *Milliken* v. *Meyer*, note 8 above, jurisdiction over an absentee rests, *not* on power, but on *duty*—the duty imposed on the absent person by his *allegiance* to the State or country from which he is absent.

foreign tourist. A necessary corollary would seem to be that the bare "domicil" of a person in the United States confers no more *jurisdiction* over him than there is over a tourist who has passed through.

Thus, it becomes important that Mrs. May and her children were all born in the United States (R. 21), have at all times been "subject to the jurisdiction thereof" (R. 21-3), and are therefore all *citizens*.

Because they are citizens, the jurisdictional significance of *bare* domicil is not what we are concerned with in this case. In January and February, 1947, each of them, because he was a citizen of the United States, also was a citizen of and therefore did owe *allegiance* to a State, which, on the facts here, was either Ohio or Wisconsin.

The "domicil" of each of them, the place where he was then "residing" within the meaning of §1 of the 14th Amendment, is, regardless of the interpretation properly to be put on the *Harisiades* case, still significant, although perhaps only because it determined for each of them which of those States was then the State of his citizenship. Thus, the Federal questions in this case are these:

The Federal Questions

1. Where a citizen of the United States, domiciled in and consequently a citizen of Ohio, is served *in Ohio* with a *Wisconsin* summons, does the Wisconsin court thereby acquire jurisdiction of the *person* of the Ohio defendant?

2. Can it be held, compatibly with the principles of public law respecting the jurisdiction of courts that are implicit in Article IV, §1 of the Federal Constitution and are protected against Federal violation by the 5th Amendment and against State violation by §1 of the 14th Amendment, that the bare domicil and consequent citizenship in a State of a citizen of the United States who is no longer present in the State give the courts of that State jurisdiction, without notice to him, to ad-

judicate him to be a minor or incompetent and make an order purporting to commit him to custody?

3. When so construed as to take from a wife who is a citizen the liberty and power to change her own or her children's domicil and consequent State citizenship from one State to another, is Ohio General Code §7996 repugnant to §1 of the 14th Amendment to the Federal Constitution?

Facts [11]

The appellant, Mrs. May, was born in Wisconsin (R.21) and there married, in the middle 1930's, the plaintiff, Owen Anderson (R. 21). He had come from near Lisbon, Ohio, where his people still live (R.40-62). Following appellant's and plaintiff's marriage, they lived in Waukesha, Wisconsin and there had three children (R.21), Ronald, born December 18, 1938, Sandra, born July 26, 1942, and James, born August 7, 1945.

Some time before or during the year 1946, serious marital troubles developed (R.14). In December, 1946, the parties agreed that appellant should go with the children to Lisbon, Ohio, where she, plaintiff and the children had often visited, there to be alone to think out the problem the parties' difficulties had created (R. 9, 14). However, the trial court finds it was the "understanding" of the parties (R. 79-80), or at least of plaintiff Anderson (R. 23-4), that appellant's stay in Ohio would be only "temporary" and that she would return to Waukesha with the children before anything "permanent" was done. (Appellant has attacked these findings throughout as contrary to the manifest weight of the evidence, R. 83, and testified that plaintiff Anderson

[11] In the courts below, counsel for plaintiff Anderson accepted the statement we there made of the facts as accurate and complete. That statement has of course had to be pruned drastically for use here. We have tried to include, however, an accurate statement of all facts still pertinent here.

told her she must decide either to "come back to him or separate." R. 14).

Appellant came to Ohio with the children on December 26, 1946 (R.9). After three or four days in Lisbon had given her the chance she sought to think quietly, she made up her mind not to go back to Wisconsin, but to stay in Lisbon, Ohio permanently, and she settled down there with the three children to live (R.12, 21-2). She has lived in Lisbon ever since (R.21).

On New Year's day, 1947, plaintiff Anderson, in Wisconsin, called appellant, in Lisbon, by telephone (R.12). During the conversation appellant exclaimed, "Owen, I'm not coming back!" During this or another conversation in the next day or two — so plaintiff Anderson claims (R. 9, 12) and the trial court finds (R. 30) — he demanded that she return the children to Wisconsin and she refused to return them. (*I.e.*, it is his own testimony, found by the courts below to be true, that from this time forward, what he claims was originally a "temporary" visit by appellant and the children to Ohio had—without his consent or authority, to be sure—in fact become a *permanent* stay there.[12] Indeed he has stipulated, with respect to appellant (R. 21-2), that appellant's *domicil* became Ohio when, in the closing days of 1946, she decided not to go back to Wisconsin and settled down with the children to live in Lisbon.)

In the final telephone conversation, on Sunday, January 5, 1947, plaintiff Anderson told appellant (R. 15), "Tomor-

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[12] As we have seen, the courts below have so construed and applied *Ohio General Code* § 7996 as to deprive Mrs. May of the *legal power* to change her children's home from Wisconsin to Ohio. Because of their construction of § 7996, the constitutionality of which is one of the two main questions in this case, the courts below hold that, as a matter of *law*, the children's absence from Wisconsin was only "temporary". The object of the parenthetical passage in the text is to dissociate this conclusion of law from the facts.

row, you are due for one of the biggest surprises of your life."

On January 6, 1947, plaintiff filed a petition against appellant for divorce in the County Court of Waukesha county, Wisconsin (R. 12, 15). Appellant was the only defendant (R. 90); the children were *not* made parties.

Appellant and the children continued to live in Lisbon, Ohio (R. 22), and, shortly thereafter, the Wisconsin court caused a Wisconsin summons and a copy of plaintiff Anderson's petition to be delivered to appellant *in Ohio* (R. 22). This was the *only* service in the Wisconsin case (R.22).

One of the children was ill and appellant was without money when she received the papers from Wisconsin (R. 16, 19). She sought the advice of counsel at once, however, and was told to keep out of the Wisconsin case and stay with the children in Ohio (R. 15) — which advice [13] she followed (R. 22).

On February 5, 1947, a day less than a month after plaintiff Anderson had filed his petition, the Wisconsin court granted him a divorce (R. 22). Its decree (R. 90) contained, among other things, this paragraph:

> "It is further ordered, adjudged and decreed that the care, custody, management and education of the minor children of the parties be and is hereby awarded to the plaintiff, subject to the right of the defendant to visit the children at any and all reasonable times."

This is the part of the decree that plaintiff Anderson brought this action to enforce. The entry of the decree puts

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[13] We were not the lawyers Mrs. May consulted at this point. However, as will appear, the advice she received was supported by the virtually unanimous holdings of the State courts of last resort, as well as by all the standard legal encyclopedias. *E.g.*, 19 *Corpus Juris*, 341, § 790. 27 *Corpus Juris Secundum*, 1163, § 303(b). 14 *Ohio Jurisprudence*, 552-3, § 149.

a period to the facts pertinent to its validity,[14] the issue here.

Why the Questions Are Believed Substantial

In *New York ex rel. Halvey* v. *Halvey* (1947), 330 U.S. 610, 615-6, 91 L.ed. 1133, 1136, 67 S. Ct. 903, 906-7, the Supreme Court of the United States expressly reserved decision on four questions. Two of those questions are ques-

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[14] The further history of the case, which is of some interest, may be briefly stated as follows:

Late in February, 1947, plaintiff and a village police officer appeared at the children's and appellant's home in Lisbon armed with a copy of said decree (R. 10, 23, 78-9). Together, plaintiff and the policeman got possession of the children and plaintiff at once removed them to Wisconsin (R. 23).

Originally, the facts were stipulated (R. 6, 21). In consequence, the record is silent concerning appellant's efforts to recover her children during the next four years and her contacts with them except for a stipulation (R. 23) that she never submitted to Wisconsin's jurisdiction by appearing in the case there.

As for the parties, plaintiff Anderson shortly remarried (R. 57) and has another child (R. 49). Appellant also remarried, becoming Mrs. James F. May (R. 48), but has no other children.

On July 1, 1951, plaintiff Anderson returned to Lisbon with the children on a visit to his people (R. 23, 40-61). He let the children go to the home of their mother, the appellant Mrs. May, and, on the advice of counsel, she refused to surrender them (R. 23).

On July 5, 1951, accordingly, plaintiff Anderson brought this action on the purported Wisconsin award. Mrs. May appeared voluntarily with the children in open court forthwith and, after a brief preliminary hearing, they were remanded in her custody (R. 6). The order of remand (see page 39 below) forbade the children's removal from the county "until this matter is finally determined", but gave plaintiff Anderson a "right of visitation with" them.

After the case had been heard but before judgment had been entered, plaintiff Anderson had the children with him and, in defiance of the trial court's order, absconded with them to Wisconsin (R. 32, 39-62).

Ultimately, after correspondence and contempt citations had proved futile (R. 32-6), Mrs. May, acting in precise accordance with instructions given her by her present counsel, effected a recovery of the children from Wisconsin (R. 45-71).

The trial court thereupon entered its judgment against Mrs. May (R. 75-6). As previously stated, its judgment was at once superseded by appropriate supersedeas bond and Mrs. May now holds the children in accordance with the original order of remand just referred to.

tions in this case (page 4 above). We urge, therefore, that it is already decided that this case involves Federal questions of substance.

I

The courts below have answered the first question in this case by holding, we believe correctly, that serving a Wisconsin summons in Ohio on a citizen of Ohio does *not* give the Wisconsin court jurisdiction of the person of the Ohio defendant.

To our surprise, although the Supreme Court of the United States has often enough *said* that such is the law, *e.g.*, in *Pennoyer* v. *Neff* (1878), 95 U.S. 714, 24 L.ed. 565, we do not find that it has ever actually *decided* the point. Therefore, particularly since this question must be answered in order to answer the second of the questions reserved in the *Halvey* case, it appears to qualify as "a federal question of substance not heretofore determined by" the Supreme Court.

II

The next question in this case is whether the domicil and consequent citizenship in a State of a United States citizen who is not present there, are enough, alone and without more, to give the courts of the State jurisdiction to adjudicate him to be a minor or incompetent and make an order purporting to commit him to custody. This question appears never to have been decided by the Supreme Court of the United States.[15]

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[15] The Supreme Court of the United States' closest approach to this question appears to have been in connection with *Seeley* v. *Seeley* (1907), 30 App. D.C. 191, 12 Ann. Cas. 1055, in which the Court of Appeals of the District of Columbia *denied* "full faith and credit" to a purported Illinois custody award, made while the child was in the District of Columbia. The Supreme Court of the United States *denied* certiorari, 209 U.S. 544, 52 L. ed. 919, 28 S. Ct. 570.

The extreme narrowness of the question is the first thing to be noted.

No Jurisdiction in Personam

As will be observed, the Wisconsin court had no jurisdiction of anyone's person except plaintiff Anderson's.

(A) It had no jurisdiction of Mrs. May's person: As was long ago said in *Pennoyer* v. *Neff*, above:

> "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them."

(B) The Wisconsin court had no jurisdiction of the persons of the children: They were not named parties to the Wisconsin case. There was no service on them of any kind.[16]

Jurisdiction in Rem?

Thus, since the Wisconsin court acquired no jurisdiction of the persons of *either* the children or Mrs. May, the question is whether the Wisconsin court in any way acquired *in*

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[16] We do not concede that service on the children *outside* Wisconsin could have given the Wisconsin court jurisdiction of their persons, even assuming them to have been citizens of Wisconsin. As previously stated, *Blackmer* v. *United States* (1932), 284 U.S. 421, 76 L. ed. 375, 52 S. Ct. 252, and *Milliken* v. *Meyer* (1940), 311 U.S. 457, 85 L. ed. 278, 61 S. Ct. 339, make it clear that obtaining jurisdiction of the *person* of an absent citizen by service on him *outside* the jurisdiction rests, *not* on power, but on *duty*—a duty imposed on him by his allegiance to the State of which he is a citizen to return in obedience to its summons. But when the complaint against him is that he is a minor or mental incompetent and ought to be committed to custody, where is the duty? The allegation of minority or other incompetence has to be either true or false. If it is true, the alleged minor or incompetent can hardly be presumed capable of grasping what is expected of him, nor can it be presumed that he is physically free to return. If, on the other hand, the allegation is false and he is in truth perfectly competent, what "duty" has he to return and defend himself against a charge that he is not? Obviously, *he* is not a transgressor, on either state of the facts. And, if the charge is false, he is transgressed against.

rem jurisdiction of the children, so as to be able to determine the rights respecting the children of the children themselves, of Mrs. May, and indeed of all the world, *without* jurisdiction of any of their persons.

No Jurisdiction in Rem of Children's Bodies

As we have seen, the Wisconsin court did not have the children in its possession or in that of its officers, and did not have jurisdiction of the person of the individual who *did* have possession of the children. Nor were the children in Wisconsin, dubious as their mere presence in the State would have been as a foundation of jurisdiction under the holding in *Pennoyer* v. *Neff*. The Wisconsin court did not even have the attenuated control over them that would have existed if, outside the State, they had been in the possession of plaintiff Anderson's servants. Thus, plainly, the Wisconsin court did *not* have jurisdiction *in rem* of the children, considered as physical objects.

Jurisdiction of Any Other Res?

Did it have such jurisdiction of any other *res* as would empower it, consistently with the principles of jurisdiction embedded in the Federal Constitution, to cut off Mrs. May's rights respecting her children, and the children's rights respecting her, by committing them to plaintiff Anderson's exclusive custody?

The only possibility of such a *res* lies in an analogy to divorce. It is now settled that the "personal relationship" between husband and wife, the "marriage tie" so to speak, is a *res* of which a court can get sufficient jurisdiction to cut it off by having before the court one party to the relationship who is domiciled within the court's jurisdiction and by giving the other party, wherever he may be, reasonable notice of the proceedings.

Analogizing from divorce jurisdiction to jurisdiction to adjudicate alleged minors and incompetents to be such and

then commit them to custody is of course a most unsafe exercise; the latter jurisdiction rests on the jurisdictional principles of the common law and equity, not on the utterly foreign canon law principles that govern jurisdiction in divorce. Proceeding, with this *caveat*, to look for relevant "personal relationships", two will be found in the case of children, namely, the relationship between a child and his father and the relationship between a child and his mother.

Conceivably, if there had been notice to the children, Wisconsin might have acquired sufficient jurisdiction of one of those relationships, to wit, the "personal relationship" between the children and plaintiff Anderson, to cut it off. *Yarborough* v. *Yarborough* (1933), 290 U. S. 202, 78 L.ed. 269, 54 S. Ct. 181, 90 A.L.R. 924 (in which, however, the child was personally present in open court during the proceedings).

But, even in divorce, if a court has only one of the parties before it and thus has jurisdiction of only one end of such a "personal relationship", the court's jurisdiction is limited to cutting off or curtailing the relationship. The court has no jurisdiction to increase, or even to fix, the personal obligations and burdens under it of the party to it who is absent. *Mansfield* v. *McIntire* (1840), 10 Ohio 27. *Cox* v. *Cox* (1869), 19 Ohio St. 502, 2 Am. Rep. 415; 20 Ohio St. 439. *Woods* v. *Waddle* (1886), 44 Ohio St. 449, 8 N. E. 297. *Weidman* v. *Weidman* (1897), 57 Ohio St. 101, 48 N. E. 506 (cited for its summing up of earlier cases). *Bay* v. *Bay* (1912), 85 Ohio St. 417, 98 N. E. 109. And see *Estin* v. *Estin* (1948), 334 U. S. 541, 92 L. ed. 1561, 68 S. Ct. 1213, 1 A.L.R. 2d [illegible]

No Jurisdiction of Any Other Res

Thus, after pursuing our tentative analogy to divorce jurisdiction to its logical limit, we find that all the jurisdiction the Wisconsin court *could* have got, even by

giving the children notice, would have been power to *cut off* the "personal relationship" between plaintiff Anderson and the children. It could have got no power whatever to do what it purported to do, namely, *increase* the weight with which that relationship bore on the children by imposing on the children a duty to stay only with their father and forswear their mother.

In fact, there was of course *no* notice to the children. Thus the Wisconsin court can have had no jurisdiction even to cut off the relationship between plaintiff Anderson and the children.

Next, it was *not* plaintiff Anderson that the Wisconsin court purported to "divorce" from the children. It was the children's *mother*, Mrs. May!

But "divorcing" Mrs. May from her children was something the Wisconsin Court could not do, on any theory, unless it had jurisdiction of, as a *res*, the "personal relationship" between Mrs. *May* and her children. And Mrs. May and the children were not before the Wisconsin court; they were all *in Ohio*. Wisconsin, therefore, did not have hold of *either* end of that *res;* the whole of it was in Ohio. The "personal relationship" between Mrs. May and her children was therefore wholly *outside* Wisconsin's power.

Therefore, if it is jurisdiction *in rem* that we are dealing with here, it is a jurisdiction *in rem* without any *res*.

Thus, the facts are such that, for the courts below to reach the result they did reach in this case, they *had* to hold what they *said* they held, namely, that by reason of the bare domicil of these children in Wisconsin, the Wisconsin courts already had jurisdiction to dispose of the children's custody long before the children left Wisconsin and long before any case or proceeding was filed in any

particular Wisconsin court (presumably from the children's birth since they were *born* domiciled in Wisconsin).[17]

Consequently, so the courts below implicitly hold, since complete and perfect jurisdiction to dispose of the children's custody was, when the children left, already attached to the children and vested in every Wisconsin court capable of receiving such jurisdiction, it is immaterial that no jurisdiction to dispose of the children's custody ever vested in this particular Wisconsin court *after* the children left. No notice, no service of process, the courts below hold, could have added anything to the jurisdiction to dispose of the children that the County Court of Waukesha county already possessed *without* notice and *without* process.

The Narrow Question

Thus, the first of the two major questions here does boil down to this extremely narrow, not to say naked, question:

> Can it be held, compatibly with the principles of public law respecting the jurisdiction of courts that are implicit in Article IV, §1 of the Federal Constitution and are protected against Federal violation by the 5th Amendment and against State violation by §1 of the 14th Amendment, that the bare domicil and consequent citizenship in a State of a citizen of the United States who is no longer present in the State, give the

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[17] The text of the holdings of the courts below is as follows. The Probate Court held:

> "The Court further finds that, in as much as the children were legally domiciled in Wisconsin, the Wisconsin court had jurisdiction over the subject matter and could *validly* award the care, custody and control of the children * * *."

The Court of Appeals held:

> "The children were domiciled in Wisconsin until December 26, 1946, *where the Wisconsin court had exclusive jurisdiction*, and that court did not *lose* its jurisdiction by reason of their going with their mother to Ohio * * *."

courts of that State jurisdiction, without notice to him, to adjudicate him to be a minor or incompetent and make an order purporting to commit him to custody?

We urge that the question is substantial for several reasons. The prime reason is that there are only two assumptions on which any such jurisdiction could be supported, namely:

First, that human beings are the chattel property of the State to which they are subject, and therefore that, whether they are inside that State or outside it, it has power, through its legislature or courts, to deliver a bill of sale or deed of gift of any of them to whomever it may select, which the courts of the place where he is will be bound to honor; or

Second, the assumption of the Civil law, on which most if not all Western absolutisms have been built, that supreme and uncontrolled power exists in the emperor (or State) "*cum populus ei et in eum omne imperium suum et potestatem concedit*", which we translate, probably barbarously, "because to him and in him the people have yielded up all their power and authority." In short, said assumption is, the State, whether embodied in an emperor, a king or a legislature, holds an unlimited and irrevocable power of attorney from the "people", every one of them, and if the State chooses to sell a member of the people into slavery, or execute him, no wrong has been done him because it is his own act. Legally, *he* has sold *himself* into slavery, or committed suicide.

Briefly indicating the answer we expect to make to each assumption, the primary answer to each is that it is false in fact:

Firstly, the States of the United States were, at their inception, and are now, free and voluntary associations for governmental purposes of the very human beings whom the

first assumption would make chattels of the State, and were *never*, any of them, absolute monarchies composed of an autocrat and a few nobles ruling a population of serfs.

Secondly, while such a thing as a surrender by the people of all their power, originally to a "*dictator*" and later to an emperor, did repeatedly happen in Rome, no such thing has happened in the United States. To the contrary, our ancestors, who were well aware of the seductive qualities of Civil law doctrine in general and of the danger of a reception of the text quoted above in particular, aimed at it, not one, but two Articles of the bill of rights, namely:

> IX. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the *people*." [18]
>
> X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the *people*."

The State constitutions sometimes manage to be still more explicit; *e.g.*, Article I, § 20 of the Constitution of Ohio, at the close of the Ohio bill of rights, provides:

> "§ 20. This enumeration of rights shall not be construed to impair or deny others retained by the people; and *all* powers, not herein delegated, remain with the *people*."

The foregoing clauses of course express merely one of the many legal effects of the basic common law rule, adhered to rigidly by the common law courts since the end of the 12th century, that a "free man" *does not have the legal capacity*, short of committing a crime, to alienate, destroy or permanently impair his free status, even by his own act,

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[18] All emphasis inside quotations, wherever it occurs in this statement, has been inserted by counsel for appellant unless the contrary is expressly noted.

much less the capacity to "yield up" such a power to anyone else. The idea of "unalienable rights" is a good deal older than Locke, as is attested, in different ways, by the Year Book cases and by the fact that three kings' pretensions that a surrender to the crown of "all the people's power" had taken place cost each his throne and one his head.

The State Decisions

We urge that the question is substantial for the further reason that the answer given it by the courts below is contrary to the virtually unanimous answer heretofore given the question by State courts of last resort. Typical cases are *De La Montanya* v. *De La Montanya* (1896), 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, 53 Am. St. Rep. 165 (child custody). *Grinbaum* v. *Superior Court* (1923), 192 Cal. 566, 221 P. 651 (alleged adult incompetent), and see 221 P. 635. *Payton* v. *Payton* (1924), 29 N.M. 618, 225 P. 576, and *May* v. *May* (1931), 233 N.Y. App. Div. 519, 253 N.Y.S. 606 (child custody).

Although we have by now examined several hundred cases,[19] we have found not a single case where "full faith and credit" has ever been given an award of the custody or guardianship of a minor or incompetent *unless* the court making the award had either (a) physical possession of the minor or incompetent, or (b) jurisdiction of his person, or else (c) jurisdiction of the person of the parent or other individual or institution who was in possession of the minor or incompetent. (Class c of course includes the almost innumerable cases where the court had both parents before it and the child was in the possession of one of them.)

[19] We have thus far examined between 400 and 500 cases in the course of preparing this appeal. The cases are so numerous, however, that we do not claim to have exhausted them even yet. Indeed, we know we have not.

Typical cases where "full faith and credit" has been *denied* for lack of all or part of these jurisdictional requisites are: *Kline* v. *Kline* (1881), 57 Iowa 386, 10 N.W. 825, 42 Am. Rep. 47. *Duryea* v. *Duryea* (1928), 46 Idaho 512, 269 P. 987. *Steele* v. *Steele* (1928), 152 Miss. 365, 118 S. 721. *Ex parte Erving* (1931), 109 N.J. Eq. 294, 157 A. 161. *Gillman* v. *Morgan* (1947), 158 Fla. 605, 29 S. 2d 372. And see *Black* v. *Black* (1924), 110 Ohio St. 392, 144 N.E. 268.

Moreover, what should be true in constitutional principle, namely, that regardless of who else is bound by proceedings to which the child or incompetent is not a party, he is never *himself* bound by an award of his custody unless the court has obtained jurisdiction of *his* person, appears to be settled law, with *no* cases contra. *In re Bort* (1881), 25 Kan. 308, 310 (Opinion by the late Mr. Justice Brewer). *Avery* v. *Avery* (1885), 33 Kan. 6, 5 P. 418, 422. *People ex rel. Allen* v. *Allen* (1886), 40 Hun. 611, 620-1. *Grinbaum* v. *Superior Court* (1923), above. And see *Re Alderman* (1911), 157 N.C. 507, 73 S.E. 126, 129, 39 L.R.A. n.s. 988, 992-3, and *Wear* v. *Wear* (1930), 130 Kan. 205, 285 P. 606, 616, 72 A.L.R. 425, 440-1.

No respectable authority supports the holding of the courts below. Among the hundreds of cases we have looked at, only two even say anything that supports it:

The later of the two is *Beckmann* v. *Beckmann* (1948), ——Mo. App.——, 211 S.W. 2d 536, which is not a decision of a court of last resort. It is decided on the sole authority of the first of the two cases, *Minick* v. *Minick* (1933), 111 Fla. 469, 149 S. 483. The other cases that *Beckmann* v. *Beckmann* relies on are all cases where the court had jurisdiction of the person of the individual in possession of the child. Indeed, even in *Beckmann* v. *Beckmann*, although the parent

in possession of the child appeared specially, he nevertheless appeared in the case throughout.

Minick v. *Minick*, the first case, asserts that the bare domicil of a child in Florida, without more, gives the Florida courts jurisdiction to award his custody. But the only authority the Florida court cites is against any such proposition, and the court admits that, without the child, or jurisdiction of the persons of both his parents, its award would be entitled to *no* "faith and credit" outside Florida. On top of this, the court's assertion of such a jurisdiction is sheer dictum. As the court holds at the outset, the appellant waived and cured the original lack of jurisdiction of her person by appearing generally and not specially in the trial court to perfect her appeal. And, although, as we have seen, Missouri later picked the dictum up, it did not last long in Florida. It was tacitly overruled in *State ex rel. Rasco* v. *Rasco* (1939), 139 Fla. 349, 190 S. 510 (where the shoe was on the other foot and Florida held that New Jersey, being without the child, was without jurisdiction), and in *Giachetti* v. *Giachetti* (1946), 157 Fla. 259, 25 S. 2d 658.

The aberrant views expressed in the *Minick and Beckmann* cases probably result from a misapprehension and misapplication of the authorities holding that the domicil of a child or incompetent in one State *restricts* the jurisdiction of *other* States to interfere with his custody—a quite different matter. E.g., *Duryea* v. *Duryea* (1928), above, and *Lannius* v. *Gregory* (1907), 100 Tex. 587, 99 S. W. 542, 10 L. R. A. n.s. 690, 123 Am. St. Rep. 809, now overruled by *Wicks* v. *Cox* (1948), 146 Tex. 489, 208 S. W. 2d 876, 4 A. L. R. 2d 1.

Frequency with which Question arises

We further urge that the question whether the bare domicil and consequent citizenship in a State of an alleged minor

or incompetent, without more, gives the courts of that State jurisdiction to adjudicate him to be such and make an order purporting to commit him to custody, is substantial because of the frequency with which it arises in the every day life of the American public.

Certainly it recurs constantly in the practice of any lawyer whose practice is at all general. We have never before had it on an appellate level. That, however, is because heretofore, in cases in which either of us has been involved, the court of first instance has held the opposite of what the trial court held here and the correctness of its holding was not questioned. Even more often, of course, the question has not arisen in the court room at all because the lawyer whose client's child was outside the State in the custody of the other parent has thought he knew better than even to ask for custody.

We should perhaps continue by urging that the question is substantial because of the consistent injustice to which the rule propounded by the courts below would necessarily lead.

The vice of a rule that a man may, without notice, be adjudicated a lunatic and committed to custody merely because he is "domiciled" inside a court's jurisdiction is, however, evident without comment.

The same thing can be said of a holding that the bare domicil of a citizen inside a court's jurisdiction gives it power, without notice and without jurisdiction of his person, to adjudicate him to be a minor and commit him to custody—although, in the case of an alleged minor, a deposit of any such jurisdiction at his "domicil" takes on an added touch of horror from the still imperfect rules for ascertaining a child's "domicil", which, as has been said, are quite capable of putting it "somewhere the child never has been, is not now, and probably never will be."

III

Turning to the third question here, it is plain enough that the courts below hold it to be unobjectionable for a *father* to move his children's home from one State to another without their mother's consent, but vicious in the extreme for a *mother* to do so without the father's consent.

It is not clear, however, whether the courts below hold that § 7996 operates directly to deprive a wife of the power to change her children's domicil, or whether it does so indirectly by depriving her of the power to change her *own* domicil.

The reason for the doubt is that, as mentioned at the outset, *Ohio General Code* §§ 8032 and 10507-8 (114 Ohio Laws 385) categorically provide, and *In re Corey* (1945), 145 Ohio St. 413, 61 N. E. 2d 892, flatly holds, that a wife's legal powers and rights with respect to her children are, in all particulars, specifically including "custody", *equal* in Ohio to her husband's. How, then, if she has power to change her own domicil, can she lack power to change her children's?

Yet it seems impossible that the courts below have held that a married woman is without power to change her own domicil. Ohio has for two-thirds of a century held that a married woman *can* have a domicil of her own. *Thompson* v. *Love* (1884), 42 Ohio St. 61, 80. *Van Fossen* v. *State* (1881), 37 Ohio St. 317, 320, 41 Am. Rep. 507. *Cox* v. *Cox* (1869), 19 Ohio St. 502, 2 Am. Rep. 415.

This uncertainty as to the exact holding of the courts below has been allowed for in stating the third question:

> 3. When so construed as to take from a wife who is a citizen the liberty and power to change her own or her children's domicil and consequent State citizenship from one State to another, is Ohio General Code § 7996 repugnant to § 1 of the 14th Amendment to the Federal Constitution?

Regardless of which construction is attributed to the courts below, we urge that construction violates, in several ways, § 1 of the 14th Amendment:

> "§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, *liberty*, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The first sentence of the 14th Amendment declares the existence of an unqualified right and privilege in every citizen of the United States, for any reason he deems satisfactory, or for no reason at all, to transfer his citizenship and allegiance from one State of the United States to another by the simple process of moving his home from the first State to the second.[20] The fact that the immediate occasion for the declaration of this privilege was the protection of newly created citizens with black skins, in no way implies that the privilege was to be theirs alone. The intention of the 14th Amendment, which could not be more clear or explicit, was to make not only them, but *all* citizens of the United States, *equal* citizens with *equal* rights before the law, and to have *no* citizen of the United States who is legally a citizen merely of a second, third or fourth class.

Immediately after the adoption of the 14th Amendment, the Supreme Court of the United States said, in *Cheever* v. *Wilson* (1870), 9 Wall. 108, 124, 19 L.ed. 604, 608:

> "It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The con-

[20] See the *Slaughter House Cases* (1873), 16 Wall. 36, 21 L. ed. 394, 409-10.

verse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so."

Again, in 1913, the same Court, in *Williamson* v. *Osenton*, 232 U.S. 619, 58 L.ed. 758, 34 S.Ct. 442, said:

"The only reason that could be offered for not recognizing the fact of the plaintiff's actual change [of domicil], if justified, is the now vanishing fiction of identity of person. But if that fiction does not prevail over the fact in the relation for which the fiction was created, there is no reason in the world why it should be given effect in any other. However it may be in England, that in this country a wife in the plaintiff's circumstances may get a different domicil from that of her husband for purposes of divorce is not disputed, and is *not open* to dispute. *Haddock* v. *Haddock*, 201 U.S. 562, 571, 572. This she may do without necessity and simply from choice, as the cases show, and the change that is *good as against her husband* ought to be good against all."

As far as is known, there is no expression by the Supreme Court of the United States that would give any more encouragement than the foregoing to the view that married women may lawfully be excluded from the privilege conferred by the opening sentence of the 14th Amendment.

We urge that, if the Ohio courts have held that §7996 deprived Mrs. May of the privilege of moving *her* home from Wisconsin to Ohio, it follows from the foregoing that Ohio has made and enforced a law that abridges a privilege given by the Constitution of the United States to all citizens of the United States regardless of their color, sex or other previous condition of servitude.

We urge it further follows that Ohio has taken from Mrs. May a *liberty* granted by the Constitution of the United

States to all citizens of the United States without regard to color, sex or other previous condition of servitude. Ohio has done so, as is obvious, for no reason other than that she is a *woman* who has married. We urge that there is nothing about being a female that makes it any less arbitrary or capricious to deny the liberty to establish a separate home to a woman who marries while extending that privilege to a man who marries, than it would be to deny that privilege to a man who marries while extending it to his wife.

We therefore urge that, if §7996 has been so applied, it has, in addition to abridging Mrs. May's privileges as a citizen of the United States, deprived her of her liberty without due process of law and denied her the equal protection of the laws.

If, on the other hand, the holding attributed to the Ohio courts is that §7996 left Mrs. May free to change her own home from Wisconsin to Ohio, but nevertheless took from her the power and liberty to change the home and citizenship of her children, we urge it follows that this construction and application of §7996 renders it void as attempted State legislation upon a subject matter that the first sentence of the 14th Amendment has taken from the States and made one of exclusively Federal cognizance:

If a State may take from a citizen mother the legal power to shift the home and State citizenship of her citizen children *into* that State, it may likewise take that power from a citizen father. And if a State may lawfully take from citizen *parents* the power to shift the home and State citizenship of their citizen children into the State, it may likewise take from them, and from all adults, the power to shift their own homes and State citizenships into the State, thus defeating in its entirety a main purpose of the 14th Amendment's opening sentence.

Lastly, if §7996 is thus applied, it still follows that §7996 deprives Mrs. May of her liberty without due process of law and denies her the equal protection of the laws:

In *Meyer v. Nebraska* (1923), 262 U. S. 390, 399, 67 L. ed. 1042, 1045, 43 S. Ct. 625, in which the United States Supreme Court overturned a State statute that made it an offense for parents to have their children taught German, the Court said:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff by the 14th Amendment. 'No State . . . shall deprive any person of life, liberty or property without due process of law.'
>
> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual * * * to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men."

In *Pierce* v. *Society of Sisters* (1925), 268 U.S. 510, 69 L.ed. 1070, 1078, 45 S.Ct. 571, the Court said:

> "Under the doctrine of *Meyer* v. *Nebraska* * * *, we think it entirely plain that [an Oregon statute forbidding parents to send their children to private schools] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

A parent's right not to have his children arbitrarily taken from him by the State was perhaps not entirely absent

from the mind of the Court when, in *West Virginia* v. *Barnette* (1943), 319 U.S. 624, 638, 87 L.ed. 1628, 1638, 63 S.Ct. 1178, 1185, the Court said:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights, may not be submitted to a vote; they depend on the outcome of no elections."

And see *Prince* v. *Massachusetts* (1943), 321 U.S. 158, 165-6, 88 L.ed. 645, 652, 64 S.Ct. 438, 442.

Ohio recognizes that the mere fact of being a female does not render a parent of children unfit to possess the power and liberty to establish a home for them and maintain them in it. In Ohio as everywhere, that liberty is freely accorded to *unmarried* mothers. Ohio likewise recognizes that the *marriage* of a parent of children does not unfit him to possess that liberty. As this case illustrates, it accords the liberty freely to *married* fathers. How, then, can a statute be anything but arbitrary and capricious which provides that, by *marrying* the father of her children, a *female* parent forfeits the power and liberty she previously possessed to establish a home for her children and maintain them in it?

Thus, as construed and applied, §7996 deprives Mrs. May of this liberty arbitrarily and capriciously. We therefore urge that it has taken her liberty without due process of law. And since §7996 as construed and applied arbitrarily discriminates against married females in favor of married males in a matter respecting which, if any discrimination could be reasonable, the reasonable discrimination would

be the other way, §7996 has denied Mrs. May the equal protection of the laws.

What we believe to be the principal subsidiary questions raised by the construction and application given *Ohio General Code* §7996 by the courts below have now been exposed. We urge that they are plainly important and substantial.

Although some of these questions have been touched on in, among other cases, *Crandall* v. *Nevada* (1868), 6 Wall. 35, 18 L.ed. 745, the *Slaughter House Cases* (1873), 16 Wall. 36, 21 L. ed. 394, and *Edwards* v. *California* (1941) 314 U.S. 160, 86 L.ed. 119, 62 S.Ct. 164, none of them has been settled. *All* the questions therefore qualify as "questions not heretofore determined" by the United States Supreme Court.

Moreover, to the extent that prior decisions can be said to intimate anything, the holding of the courts below is contrary to those intimations. To that extent, therefore, the decision of said questions by the courts below is "probably not in accord with applicable decisions of this court."

WHEREFORE: Appellant respectfully urges that all technical jurisdictional requirements are satisfied, that the Federal questions involved are important and substantial, and that the Supreme Court of the United States therefore has jurisdiction of this appeal by virtue of Title 28, *United States Code*, §1257(2).

Respectfully submitted,

RALPH ATKINSON,
F. W. SPRINGER,
Attorneys for Appellant.

APPENDIX

PROBATE COURT

Order of July 5, 1951 (R. 132:)

(Still in force.)

This day this cause came on to be heard and was submitted to the Court upon an agreed statement of facts. And it appearing that the question before this Court is one entirely of law, this cause is continued to July 13, 1951, at 9:30 a.m., pending which time counsel for the petitioner and for the respondent have agreed to file briefs.

It is the order of this Court that pending a final hearing of this case, the minor children concerned, to wit, Ronald Anderson, Sandra Anderson and James Anderson, are to remain with Mrs. Leona Anderson May at her home on the Lisbon-Columbiana road, Route 5, Lisbon, Ohio, there to remain and be within the jurisdiction of this Court at all times until this matter is finally determined, and the said children shall not be removed from Columbiana county.

Pending the final determination of this cause, the petitioner herein, Owen Anderson, shall have the right of visitation with the minor children concerned at any and all reasonable times.

OPINION OF PROBATE COURT

Part of Record (R. 21-31)

July 13, 1951

TOBIN, J:

This cause came on to be heard on the petition of Owen Anderson for Writ of Habeas Corpus, against Leona Anderson May, his former wife, and involved the three minor children of the parties: Ronald Anderson, Sandra Anderson and James Anderson.

n this action an agreed Statement of Facts was sub-tted to the Court whereby the parties agreed and stipu-ed as follows:

"That the defendant, Leona Anderson May, is a native of the State of Wisconsin and that the plaintiff and defendant were married in the State of Wisconsin and were residents of and domiciled in that State up to the latter part of the month of December, 1946, at which time the defendant left the State of Wisconsin with the aforesaid children and came to the State of Ohio; that the said children which are the subject of this action in Habeas Corpus, to wit: Ronald Anderson, Sandra Anderson and James Anderson, were born in the State of Wisconsin and at all times resided in that State with their parents, plaintiff and defendant, up until the last part of December, 1946, at which time the defendant brought them into the State of Ohio; that the plaintiff, Owen Anderson, at all times has been, and is now, a resident of and domiciled in Waukesha County in the State of Wisconsin.

"That the said defendant, Leona Anderson May, established a separate domicile in the State of Ohio the latter part of December, 1946, and has ever since that time been domiciled in Lisbon, Columbiana County, Ohio.

"That on February 5, 1947, the plaintiff herein was granted a divorce in the County Court of Waukesha, State of Wisconsin. That at the time said divorce was granted, and at the time the petition for said divorce was filed, as well as at all other times in between, the defendant, Leona Anderson May, was in Lisbon, Columbiana County, Ohio, and had with her at all said times the three minor children aforesaid, Ronald Anderson, Sandra Anderson and James Anderson.

"That the only service made on the defendant in connection with said divorce proceedings, was that made by the Sheriff of Columbiana County, Ohio, in which he personally handed the defendant a copy of the summons from Waukesha County, Wisconsin, and a copy of the divorce petition filed in the County Court of said

Waukesha County, Wisconsin. That the defendant never entered her appearance in the County Court of Waukesha County, State of Wisconsin, and filed no waiver, answer or demurrer therein. That the plaintiff obtained a decree of divorce, which among other things, adjudged and decreed that the care, custody, management and education of the minor children of the parties was awarded to the plaintiff, subject to the right of the defendant to visit said children at any and all reasonable times. That said decree was entered by default in the absence of any appearance by the defendant.

"That thereafter the plaintiff came to Lisbon, Columbiana County, Ohio, and, accompanied by a police officer of the Village of Lisbon, Ohio, demanded and obtained the aforesaid children from the defendant. That the plaintiff has retained custody of said minor children since February of 1947, having taken them back with him to Waukesha County, Wisconsin.

"That no further legal proceedings of record have been had in said divorce case since the aforesaid divorce decree was entered.

"That on July 1, 1951, the plaintiff brought the aforesaid children with him on a visit to Columbiana County, Ohio, and voluntarily permitted the children to go on a visit for a limited period of time to their mother's, the defendant herein. That the mother, the said defendant herein, has refused to surrender said children to the plaintiff, and the plaintiff has filed this action to recover the possession and custody of said children."

In addition to this agreed Statement of Facts, the parties here are unable to agree as to the fact whether or not the children were in the State of Ohio, with the consent of the plaintiff, or father, Owen Anderson. Testimony was taken, both parties testifying, and the Court does find that the children were brought into the State of Ohio by the father, at the time they actually came into the State of Ohio with the mother, with the knowledge and consent of the father, the understanding of the father being that such visit was temporary, that before anything permanent was

done regarding the marital status of these parties, including the children, the children were to be returned to the State of Wisconsin; and that he did ask for the return of the children prior to January 6, 1947, the date the petition for divorce was filed.

DECISION

The agreed statement of facts together with the facts found by the Court raises the following questions:

1. Can the Wisconsin court decree be collaterally attacked in this Ohio court; or under the full faith and credit provision of the United States Constitution, must this Court accept such decree at its face value?

This question has been decided many times by the Courts of Ohio, as well as by the Federal Courts — who have held that while full faith and credit will be given to divorces granted in other states, nevertheless, where the divorce was granted upon service of summons by publication and no personal service was had within the State granting the divorce, the decree is not effective beyond the dissolution of the marriage contract, and as to other matters it may be collaterally attacked as to all other related subjects. *Cox vs. Cox*, 19 O. S. 502; and 14 *O. Jur.* 553. Under these decisions, this Court is permitted to entertain pleadings and evidence relative to this Wisconsin decree to establish whether or not said decree was valid as pertaining to the subject matter at hand, to wit: the custody of these children. In other words, it is the finding of this Court that it legally has the right to question that much of the Wisconsin decree, that deals with the custody of the children which it purports to determine. In passing it might be stated that this entire Habeas Corpus proceeding is based upon the Wisconsin decree of divorce, granting custody and control of said children to the father, or Petitioner, in this case.

The next question to be determined is whether or not the purported personal service upon the defendant, Leona Anderson, now May, through the Sheriff of Columbiana County, Ohio, amounted to personal service in Wisconsin. The Court was unable to obtain, nor could counsel obtain

for the Court, the exact statutes on service in the State of Wisconsin. However, in Keezer on *Marriage and Divorce*, Third Edition, at page 1236, the statement is given as follows:

> "Personal service outside of the State is equivalent to publication in the State of Wisconsin."

The Court will accept, therefore, this statement to be the law of the State of Wisconsin, and, therefore, this case will be treated as if service had been made by publication.[21]

This brings us logically to the next question, namely:

2. There being no personal service on the defendant, Leona Anderson May, in the divorce case in Wisconsin, and it being agreed by the parties that the children were not physically present in the State of Wisconsin, either at the time of filing the divorce petition, or at the time of obtaining the divorce, did the Wisconsin Court have the authority to decree the custody of these minor children to the Petitioner herein, their father?

There are in the United States two schools of theory on that point. 14 *Ohio Jurisprudence* 552, §149, indicates that Ohio follows that theory which states that personal service or presence of the children within the State is necessary to give the Court jurisdiction to decide custody of minor children.[22] However the statement in *Ohio Jurisprudence* is based upon two cases therein cited: *Cohen vs. Judge*, 13 O. Appellate 449; and *Keenan vs. Keenan*, 17 Ohio Dec. N. P. 581. Reading of these cases throws a different light on the subject.

The *Cohen* case had a peculiar set of facts. In that case the children had never been out of the State of Ohio, except on summer vacations. The mother had gone to Illinois and obtained an Illinois divorce after two years' or more, absence from Ohio. Said Illinois court granted to her the

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[21] The Wisconsin statutes are quoted in the opinion of the Court of Appeals at page 54 below.

[22] It will be discovered that the trial court cites no example of any theory other than the theory it states above.

care, custody and control of the child involved, based upon its presence in Illinois during Summer vacation. The Ohio courts held, in the *Cohen* case, that a foreign court in a divorce proceeding on service by publication against a defendant in Ohio, has no jurisdiction or control over the defendant's children, domiciled in Ohio, and an award of custody of the child by such court is of no effect; that such foreign court could not obtain jurisdiction over said children by their being temporarily out of the State, their domicil remaining in Ohio. The court emphasized the fact, that the children were domiciled in Ohio, had always been domiciled in Ohio, and had never been domiciled in the State of Illinois, that their presence during Summer vacations was not enough to give Illinois jurisdiction.[23]

Black v. *Black*, 110 O. S. 392, another case cited, holds as follows: The mother in Ohio, had filed an action in divorce. The father contested the same, particularly that part relating to the custody of the minor child, and introduced a Massachusetts decree, obtained by service by publication in which the matter of divorce and the custody had been settled by the Massachusetts court. The Court refused to recognize the Massachusetts divorce, in so far as it dealt with the custody of the child remanded. One of the questions raised in the *Black* case is whether or not the Court of Common Pleas of Franklin County, Ohio, had jurisdiction at all. The Court first determined that it did have jurisdiction but because the defendant had submitted himself to its jurisdiction. However, the child involved in the case had already been made a ward of the Juvenile Court of Franklin county and placed in the custody of the mother, and the child had been with the mother in Ohio for nearly a year before the divorce decree in Massachusetts had been obtained.[24]

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[23] The trial court is in error in its statement of the facts of *Cohen* v. *Judge* (1929), 13 Ohio App. 449, 32 Ohio C. C. ns. 457. The children were never in Illinois until *after* the Illinois decree of divorce. Due to this error respecting the facts, the trial court misreads the holdings in *Cohen* v. *Judge*.

[24] *Black* v. *Black* (1924), 110 Ohio St. 392, 144 N.E. 268, on all its facts, is more in point than appears from the Probate Court's opinion, and is perhaps directly in point.

In *Re Paul J. Poage*, 87 O. S. 72, the child was brought into the State of Ohio by the mother, without the knowledge or consent of the father, the father at all times remaining in Kentucky. An arrest [of the father] for non-support followed. In a Habeas Corpus hearing the Ohio court held, among other things, that the legal domicile of the child remained in Kentucky with the father.[25]

Keenan vs. *Keenan*, 17 O. Dec. N.P. 581 contained these facts: The parties had originally lived in Missouri. The mother took the child, or children, fled from Missouri, came to Ohio and lived here two or three years. The question arose whether or not the foreign decree could affect her rights to the children in Ohio. The Court held that it could not, where there had been no original service. In that case, the divorce was granted on a cross-petition on which there was no personal service made. However, the best interest of the children was taken into consideration in deciding this case.

This brings us to the crux of this case, namely: Can the State of Wisconsin grant the care, custody and control of these children who have been physically absent from the State of Wisconsin for a period of ten days, prior to the filing of the petition, and where the father has consented to such absence only on a temporary basis; and, secondly: Where was the legal domicile of the children? It is the belief of this Court that the legal domicile of the children is very important.

There is no question but that Mrs. Anderson established her domicile in Ohio, the exact time, I do not know, except that it was between December 26, 1946 and January 5, 1947. *When she left Wisconsin, it was undecided whether she was going to stay or come back.*[26] But at the exact time when she informed her husband she was not coming back to him

[25] The opinion of Judge Donahue in *In re Poage* (1912), 87 Ohio St. 72, 100 N.E. 125, contains an extended discussion of *Ohio General Code* § 7996 (see 87 Ohio St., 84-5) and is of importance because the trial court's application and construction of § 7996 is very evidently the outcome of the interpretation the trial court put on that discussion. It will be noted that Judge Donahue's discussion overlooks § 8032. Section 10507-8 did not become effective until two decades later, in 1932.

[26] Emphasis added by counsel for Mrs. May.

but she was going to stay in Ohio, she lost her Wisconsin domicile and obtained a domicile in Ohio. 14 *O. Jur.* 582; *Sturgeon* v. *Korte*, 34 O.S. 525; *Smerda* v. *Smerda*, 35 Ohio Op. 432, 74 N.E. 2d 751.

Domicile, of course, is different from residence. A person may be domiciled in a state and yet not have residence in that state, for any number of purposes. For the purpose of divorce under our statutes residence in the state for one year is required, or for the purpose of obtaining alimony only thirty days in the state is required.

However, did the mother's change of domicile effect a change of domicile for the children? Secondly, does it matter in so far as the ability of the Wisconsin court to grant the custody of the children; or, stated simply, regardless of the domicile of the children, must they physically be within the State of Wisconsin?

General Code of Ohio, Section 7996, states:

> [§7996.] "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto."

Therefore, the domicile of the children originally was with the father and they were domiciled in Wisconsin. When the mother changed her domicile, did that affect the domicile of the children?

In re Adoption of Francis, 49 O.L.A. 427, held in an adoption proceeding; that where a Nevada divorce had been obtained by the mother, the child being at the time of the divorce in Ohio, and the father being resident in New York, the Nevada decree ordering support by the father and custody of the child to the mother, held to be null and void; and it further holds that where the child was taken from the father's domicile, *without his consent and against his will*, the child was legally domiciled in the State of New York with the father.

Let's examine the facts as we have found them here. It is true that the children were not taken into the State of Ohio, against the father's will, in the sense that the mother abducted them, or stole away in the dark of the night. The

father knew they were coming to Ohio. The facts clearly show that the children were brought into Ohio with the understanding that whichever way the mother made up her mind, relative to a divorce, the children would be brought back to Wisconsin. The Court further finds that the plaintiff, or father, asked for the return of the children, once he had been informed that the mother intended to remain in Ohio, and she refused to return them.

Under these circumstances, the Court finds that the children, while they were taken into the State of Ohio with the knowledge and consent of the plaintiff, for their temporary absence, their return was withheld against his will and without his consent, and that he had never consented to the children permanently leaving Wisconsin. The Court therefore finds that the legal domicile of the children, at the time of the filing of the divorce, and at the time of the decree in February, 1947, was in the State of Wisconsin with the father; and that the change of domicile by the mother was ineffective to change the domicile of the children.[27]

The Court further finds that in as much as the children were legally domiciled in Wisconsin, the Wisconsin court had jurisdiction over the subject matter and could validly award the care, custody and control of the children to the plaintiff in that action,[28] and their physical absence from Wisconsin was not sufficient to deprive that Court of jurisdiction in this case. In the instant case, the children had been in this State for less than ten days from the time the

[27] The trial court bases this holding wholly on § 7996, above. In its special findings of law, it holds (R. 82):

> "The plaintiff husband in this case having never consented to change the home or domicile of said children to Ohio, and having never consented to their permanently leaving the State of Wisconsin, and the plaintiff being the *legal head of the family*, and having *established a home in Wisconsin* for said parties and children, the *legal domicile* of the children, on January 6, 1947, and continuing through the time of the divorce decree, was still in Waukesha county, Wisconsin, within the territorial jurisdiction of the County Court."

[28] The bare domicil of the children in Wisconsin is here held to have given the Wisconsin court jurisdiction to award their custody. Nowhere does the opinion cite any authority that supports this crucial holding.

mother acquired a legal domicile. To say, under those circumstances, that the original Court *lost*[29] jurisdiction to determine custody, is to place a premium upon the taking of children from one state to another to avoid that court's jurisdiction.

It would be most particularly true in this county, which borders upon two other states, that a court could be deprived of making a just and equitable order for the control, care and education of minor children, by the simple expedient of removing the children from the State. I do not believe that that is the meaning of the law.

Therefore, under the peculiar circumstances of this case, I do not believe that the State of Wisconsin *lost* its right to determine the legal custody of these children. The Writ will be granted as prayed for.

Exceptions to the Defendant.

SPECIAL FINDINGS OF LAW (R. 81-2)[30]
SEPTEMBER 19, 1951

As conclusions of law, stated separately from the foregoing conclusions of fact, the Court finds:

a. That this Court had jurisdiction over the parties and the subject matter, and that the Wisconsin court's decree could be questioned by both parties in so far as it related to the custody of the children.

b. The Court, however, further finds, as a matter of law, that it is required by Article IV, §1 of the Constitution of the United States, to give full faith and credit to the Wisconsin decree in all particulars, to include the adjudication of the custody of the minor children of the parties.

[29] The emphasis is added by counsel for Mrs. May. The trial court is holding that the jurisdiction of the Wisconsin court attached to the children *before* they left Wisconsin—*i.e.*, before any case or proceeding respecting their custody was ever filed in any Wisconsin court.

[30] At the request of Mrs. May (R. 76), the Probate Court found the facts and the law separately. As the findings of law are an expression of the trial court's opinion as to the applicable law, Paragraph 1 of Rule 12 would seem to require that they be set forth in this Appendix.

c. The Court finds that the legal domicile of the minor children at the time of the filing of the divorce case [, was] in Waukesha county, Wisconsin, and that the Waukesha County Court had jurisdiction over the subject matter involved, namely: the care, custody and control of the minor children of the parties, and, therefore, the Waukesha county, Wisconsin, divorce decree is entitled to full faith and credit in all its particulars as dealing with the care, custody and control of the minor children.

d. The Court further finds as a matter of law, in addition to the statement of facts, that Leona Anderson May did obtain a domicile in Ohio some time between December 26, 1946 and January 6, 1947, when she made up her mind to reside in Ohio and not to return to Wisconsin and so informed her husband.

[d-1.][31] The Plaintiff husband in this case having never consented to change the home or domicil of said children to Ohio, and having never consented to their permanently leaving the State of Wisconsin, and the Plaintiff being the legal head of the family, and having established a home in Wisconsin for said parties and children, the legal domicile of the children, on January 6, 1947, and continuing through the time of the divorce decree, was still in Waukesha county, Wisconsin, within the territorial jurisdiction of the County Court.

e. The Court having determined that the Waukesha county, Wisconsin divorce decree was entitled to full faith and credit, as provided in Article IV, §1 of the Constitution of the United States, and that said decree gave the care, custody and control of said minor children to the Plaintiff, Owen Anderson; and, further, that said children are being held by Leona Anderson, now May, against the wishes of the Plaintiff, Owen Anderson, and against the effect of the divorce decree hereinabove stated, and therefore unlawfuly and illegally, said children ought to be given into the Plaintiff's custody, as required by said decree.

[31] As the record shows (R. 76), these findings were dictated in open court and the paragraphing and punctuation are the reporter's, not the court's. We have therefore felt free to take minor liberties with it.

OPINION OF COURT OF APPEALS

December 15, 1951

(*Not* part of record.) [32]

GRIFFITH, J.

The appellant here, Leona Anderson May, is seeking a reversal of the judgment of the Probate Court of Columbiana County, Ohio, entered on the 21st day of September, 1951. That court allowed a writ of Habeas Corpus ordering the three minor children of Leona Anderson May and Owen Anderson, released to the custody of the father.

The Habeas Corpus proceeding is based upon a decree of a county court of Waukesha County, Wisconsin, wherein the custody and control of the children was awarded to the father, the relator in this case. The appeal was filed on questions of law and fact, but it has been submitted to this Court by counsel on questions of law, only, it appearing that the action is not a chancery case. The following facts were stipulated:

[Here appears the Agreed Statement of Facts already quoted in full in the opinion of the trial court on pages 40 and 41 above.]

Testimony of Mrs. May and Mr. Anderson was taken and, so far as the issues in this case are concerned, that is all the record that is pertinent to the solution of the instant problem. The conduct of the father and the mother of the children following the Probate Court's announcement of its

[32] While the opinion of the trial court is part of the official record in the case, the opinion of the Court of Appeals is not in the record. No copy of it is filed in the case, even unofficially. To get a copy of a Court of Appeals opinion in the particular Ohio appellate district involved, it must be purchased from the secretary to the Judges. When received, it bears no official authentication of any kind. We feel obliged by paragraph 1 of Rule 12 to insert here the opinion thus purchased by us. We wish to avoid, however, any representation that it is something more than or different from what it is.

decision, reprehensible as that conduct may be on the part of each,[32a] has no bearing on the decision of this case.

The testimony of the father and mother bears directly on the conditions under which Mrs. May took the children from Wisconsin to Ohio.

Mr. May [*i.e.*, plaintiff Anderson] testified [on cross-examination (R. 11, 12)]:

> "A. I agreed that she could take them with her, after arguing the statement pro and con; she could take them with her. And if her mind was made up, she could settle things at home. That was the understanding I had when she left.
>
> "Q. Did she say she would bring the children back?
>
> "A. She agreed to it when she left.
>
> [* * *][33]
>
> "Q. When you had this telephone conversation with her on New Year's day, what was said?
>
> "A. The only thing I can remember is, 'Owen, I'm not coming back!'
>
> [* * *][34]
>
> "A. I called her up and asked her to bring the children back. [* * *][35] I asked them all to come back."

Mrs. May testified [R. 14] that at the time she left Wisconsin the children's ages were 8 years, 5 years and 18 months [and, following other testimony, further testified (R. 14, 15, 17) as follows]:

> "Q. What was the purpose in coming to Ohio?
>
> "A. He told me to get away by myself to think it over, or what I wanted to do. Either come back to him or separate.

[32a] The facts respecting the conduct of each party are briefly stated in the last three paragraphs of note 14 to the Jurisdictional Statement, page 19 above.

[33] The opinion omits a question and answer.

[34] The opinion omits three questions and two answers.

[35] The opinion omits a question and part of an answer.

"Q. When you left Wisconsin, what was said about the children?

"A. Nothing was said. He said if was up to the court. He said he would never separate the three of them.

[* * *][36]

"Q. Was there anything said about bringing the children back to Wisconsin?

"A. Nothing was said.

"Q. What was your understanding?

"A. To come here and think it over, and I decided to stay.

"Q. What was your understanding about the children?

"A. There was no understanding. All I know was that I had them with me. When the papers were served I asked the attorneys what to do about signing the papers and they told me to stay here.

[* * *][37]

"Q. At the time you left Wisconsin had you made up your mind that you would not come back to Wisconsin?

"A. At the time I left, I really didn't know what I was going to do."

From the record before us, it is apparent that Leona Anderson May was a native of Waukesha,[38] Wisconsin; that she and Owen Anderson were married in the middle thirties and took up residence in Waukesha where they lived their entire married life. Their domicil and permanent home, freely chosen by both, was fixed in Waukesha up to December 26, 1946; that on December 26, 1946, Leona Anderson May left Waukesha with the three children and came directly to Lisbon, Ohio, where she established her domicil. That she brought the children to Lisbon with the knowledge and consent of the father to think over her domestic differences with her husband, and decide whether she would

[36] The opinion omits two questions and two answers.

[37] The opinion here omits two and a half pages of testimony.

[38] Mrs. May, although a native of Wisconsin (R. 21), was not a native of Waukesha. She came from a different part of the state.

longer live with him. That on New Year's day, she told her husband she was not coming back. That the father thereupon requested the return of the children as he had stated to the mother that the matter of their custody "was up to the court."

That on January 6, 1947, Owen Anderson filed his action in Waukesha for divorce and custody of the children and said divorce was granted to him on February 5, 1947, which decree was made in the absence of the mother and the children from the State of Wisconsin and without service or jurisdiction over them other than the substituted service in the divorce case.

The court awarded custody of the children to the father. The only service made on Leona Anderson May in the divorce case was through the Sheriff of Columbiana county, Ohio, who served her with summons and a copy of the petition. That no personal service of any nature was made upon Leona Anderson May in the State of Wisconsin. That neither she nor the children were in Wisconsin at the time the divorce petition was filed nor until long after the decree of custody and divorce was granted. That they at all times remained in Lisbon, Ohio. That in February, 1947, after the decree of divorce was granted, Owen Anderson came to Lisbon with a copy of the Waukesha court order and demanded and obtained from Mrs. May the children, and took them back with him to Wisconsin.

Nothing happened during 1947, 1948, 1949, 1950, and the first half of 1951. The children remained with the father in Waukesha from 1947 until July, 1951. On July 1, 1951, Owen Anderson brought the children to Columbiana county and permitted them to visit the mother for a limited period of time. The mother now refuses to surrender the children back to the father, hence this proceeding.

When Mrs. May brought the children to Ohio in December, 1946, it was understood between her and her husband that it was a temporary and conditional taking[39] until she

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[39] Mrs. May has attacked this finding throughout as contrary to the manifest weight of the evidence (R. 83) and testified that plaintiff Anderson told her she must decide either to "come back to him or separate" (R. 14).

could make up her mind regarding their marital difficulties. He permitted her to take them on this basis and if she did not return to Wisconsin, then the court would determine the matter of custody. "The court" unquestionably meant the Waukesha court which was the only court having jurisdiction over them at the time of their discussions.[40] She came to Ohio for a special and temporary purpose when she left Waukesha. She was uncertain as to her ever coming back.[41] Something occurred after she left which induced her to adopt Ohio as her permanent home.

Did the Court of Waukesha county, Wisconsin, in the divorce proceeding on substituted service against the mother when both the mother and children were in Ohio, have power or control over the children?[42]

Did the mother's change of domicil effect a change of domicil for the children?

The summons served in the divorce case amounted to constructive service or service by publication, although the Sheriff of Columbiana county, Ohio, personally handed Mrs. May the summons and copy of the petition.

WISCONSIN STATUTES, 1949

Section 262.12

> "When the summons cannot with due diligence be served within the state, the service of the summons may be made without the state or by publication upon a defendant when it appears from the verified complaint that he is a necessary or proper party to an action or special proceeding as provided in Rule 262.13 in any of the following cases: (1) (2) (3) (4) (5) when the action is for divorce or for annulment of marriage."

[40] This statement is flatly contrary to the only evidence there is on the point (R. 18). It is quite clear, moreover, that when Mrs. May left Wisconsin, there had been no decision as to which of them would apply for the divorce in the event divorce was decided on (R. 15).

[41] It is urged that the evidence is correctly appraised by the Court of Appeals' statement that Mrs. May "was uncertain as to her ever coming back" when she left Wisconsin; not by its other inconsistent statements.

[42] Despite its pertinence, the Court of Appeals nowhere answers this question.

Section 262.13

> "In the cases specified in Rule 262.12 the plaintiff may, at his option, and in lieu of service by publication, cause to be delivered to any defendant personally without the state a copy of the summons and verified complaint or notice of object of action as the case may require, which delivery shall have the same effect as a completed publication and mailing."

Where were these children domiciled during the period of time between the filing of the divorce petition and the granting of the decree?

Two elements must concur to establish domicil — (1) residence, and (2) intention of remaining.

The domicil of a minor child is normally that of the father. A minor cannot change his domicil. Was the removal of these three children from Waukesha under the circumstances, such as to effect a termination of their domicil with the father there in Wisconsin? We think not.

She brought them to Ohio on a temporary and conditional basis with the understanding that they should be returned if she decided to separate from her husband. She decided to separate and then it was that the temporary permission ended. Until she said to him over the phone on New Year's day of 1947, "Owen, I'm not coming back!"

The children were domiciled in Wisconsin until December 26, 1946, *where the Wisconsin court had exclusive jurisdiction*, and that court did not *lose*[43] its jurisdiction by reason of their going with their mother to Ohio to mediate and decide her program of life for the future. Temporary ab-

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[43] All emphasis in the above passage is added by counsel for Mrs. May. As will be observed, the passage specifically repeats and thus approves the trial court's holdings (a) that the bare domicil of these children in Wisconsin gave the Wisconsin court jurisdiction to award their custody, and (b) that said jurisdiction had attached to the children *before* the children left Wisconsin — *i.e.*, before any case or proceeding respecting their custody had been filed in any Wisconsin court.

sence of the children from Wisconsin[44] could not change their legal settlement. The Wisconsin court did not lose jurisdiction while they were temporarily in Ohio.

While the facts in each of these cases are entirely different from the case before us, we believe the reasoning in the cases of *Cohen* v. *Judge*, 13 Ohio Appeals, 449, *Keenan* v. *Keenan*, 17 Ohio Dec. N. P. 581, *Black* v. *Black*, 110 O. S. 392, supports our conclusions.[45]

The children were in Ohio with his consent and permission. After that announcement, he demanded that she return the children, which demand was ignored. The children from that time forward were in Ohio against his will and without his permission. It was during that period of time that the divorce proceedings were commenced and concluded. The change of the domicil of the mother under these circumstances, did not in any wise effect a change of the domicil of the children.

The Court had no alternative but to allow the writ and its judgment on that order will be affirmed.

Judgment affirmed.

PHILLIPS, J., concurs.

NICHOLS, P. J.

I cannot concur in holding that the Court of Waukesha, Wisconsin, had jurisdiction to award custody of the minor children of the parties to that action, for the reason that such children were not within the jurisdiction of that court at the time the petition for divorce was filed, or at the time the decree was rendered.

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[44] It will be observed that, by thus holding, as a matter of law, that the children were only "temporarily absent" from Wisconsin, the Court of Appeals accepts also the Probate Court's holding that § 7996 deprived their mother of the legal power to alter their domicil.

[45] If the cases the court cites are examined, it will be found that the decision in *Keenan* v. *Keenan* went off on a point that makes it irrelevant here, that the *ratio decidendi* in *Cohen* v. *Judge* is flatly opposed to the position here taken by the Court of Appeals, and that *Black* v. *Black*, to the extent it is in point (and we think it is in point), is also flatly opposed to that position. Thus the opinion of the Court of Appeals, like the opinion of the Probate Court, is entirely barren of any authority that supports the result reached.

However, if I am right in my finding that the Waukesha court did not have jurisdiction, then this Habeas Corpus proceeding in Columbiana county was one solely to determine which of two parents having equal rights to children should be awarded custody thereof since the parents are not living together and cannot have joint custody and control thereof.

In this case, in the proceeding in Columbiana county, the court's judgment awarding custody to the father is entirely supported by the evidence and is for the best interests of the children.

I, therefore, concur in the judgment for the reasons stated.

(NOTE BY APPELLANT'S COUNSEL: As stated at the opening of the jurisdictional statement under the heading "The Issue", the custody award required by the welfare of children is, in Ohio, an issue that habeas corpus *cannot* be used to try. And as the Probate Court notes at the end of the third paragraph of its opinion proper, no such issue was tried in this case.

(Since the issue of the children's welfare could not be and therefore was not tried in this case, it would be unfair to plaintiff Anderson to draw any inference as to that issue from evidence that came in on other issues. However, if such an inference were nevertheless to be drawn from that evidence, it would be the opposite of that stated in the foregoing concurring opinion.)

OPINION OF THE SUPREME COURT OF OHIO

Anderson, Appellee, v. *May, Appellant*, 157 Ohio St. 436, 105 N. E. 2d 648.

April 2, 1952

It is ordered and adjudged that this appeal of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

Weygandt, C. J., Middleton, Matthias and Hart, JJ., concur.[46]

[46] As is evident from the fact that the report does not show part of the Judges "not participating", the case was heard before a full court of seven judges. As the report shows only the Chief Justice and three judges concurring, three Judges who participated did *not* concur. They were Stewart, Taft and Zimmerman, JJ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 244

LEONA ANDERSON MAY,

Appellant,

vs.

OWEN ANDERSON

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

RALPH ATKINSON,
F. W. SPRINGER,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 244

LEONA ANDERSON MAY,

Appellant

vs.

OWEN ANDERSON,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

This brief is filed because, where an appellee files a motion to dismiss or affirm as appellee Anderson has done here, paragraph 3 of Rule 12 seems to require the appellant, if he opposes the motion, to indicate his opposition by filing an opposing brief.

As is perhaps evident without this brief, appellee Anderson's combined motion and contra jurisdictional statement, instead of refuting the contention of the appellant, Mrs. May, that the Supreme Court of the United States has appellate jurisdiction of this case and that the case involves questions proper for the Supreme Court to decide, tends to support her contention:

I

Said combined motion and statement concedes that all technical jurisdictional requirements imposed by 28 U. S. C. § 1257 (2) are satisfied by addressing itself solely to a claim that the federal questions the case presents are not substantial.

II

In arguing that the questions are insubstantial, moreover, appellee Anderson makes no effort to meet the fact that this case presents two federal questions which, in *New York ex rel. Halvey* v. *Halvey* (1947), 330 U. S. 610, 615, 91 L. Ed. 1133, 1136, 67 S. Ct. 903, 906, the Supreme Court of the United States expressly raised and on which it then expressly reserved decision.

And appellee Anderson does not deny that those questions are questions that arise daily throughout the United States in the lives of the public, or that they are of such character that the answers given them determine more often than not the entire future of the people whose lives they touch. He does not try to deny that the answers the courts below have in this case given said questions will, if those answers are permitted to stand, consistently lead hereafter to gross injustice. (The Court of Appeals' opinion in this case was on July 7, 1952 published in 63 *Ohio Law Abstract* 324. Publication in the National Reporter System, 106 or 107 N. E. 2d, will therefore shortly follow.)

Thus appellee Anderson does not deny that this case presents questions of an importance that fully justified the Supreme Court's reservation of them in the *Halvey* case, above. Nor does he deny that they are questions the Supreme Court has never determined.

Instead, he contends that the federal questions here are not substantial because, so he asserts, the courts below have

decided them "correctly." Two answers to this are obvious:

First, the contention assumes that the Supreme Court of the United States will not, to settle an important question, admit a case and then affirm the court below. The reports are replete with cases that demonstrate the contrary.

Second, appellee Anderson's assertion that the courts below have decided the federal questions in this case correctly, *an assertion unsupported by the citation of a single authority*, flies in the face of what, as we show on pages 28 to 30 of the jurisdictional statement, is today the unanimous holding of all State courts of last resort who are known to have had before them the first of the two main questions in this case, namely: Do the bare domicil and consequent citizenship in a State of a United States citizen no longer present in the State, give the courts of that State jurisdiction, without notice to him, to adjudicate him to be a minor or incompetent and make an order purporting to commit him to custody?

Said assertion flies in the face, further, of the view seemingly expressed on that question by at least two members of the Supreme Court in their concurring opinions in the *Halvey* case, *supra* (330 U. S. 616, 91 L. Ed. 1137, 67 S. Ct. 907).

Turning to the questions connected with *Ohio General Code* § 7996, which reads:

> "§ 7996. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto",

they arise, as we have seen, because the courts below have so construed and applied § 7996 as to deprive Mrs. May of the legal power to shift her children's domicil and consequent State citizenship, and perhaps also her own, into Ohio.

Appellee Anderson ignores the questions whether, as thus construed and applied, § 7996 constitutes State interference with a subject matter which the first sentence of the 14th Amendment has made one of exclusively federal cognizance, and whether it takes from Mrs. May a "privilege or immunity" given her by that sentence.

He argues, however, that the construction given § 7996 by the courts below applies only to cases where there has been no permanent separation of the husband and wife, that this application is reasonable, and therefore that it is at least not violative of the "due process" and "equal protection" clauses of the 14th Amendment. He says:

> "If the defendant [wife] were * * * *permanently* separated from the plaintiff [husband] at the time that the divorce action was commenced, and if *she* had the children at the time of such separation * * *, she could then have established the domicile of the children at such place that her place of abode was established."

This is astonishing argument. It is stipulated in this case, and the evidence shows the stipulation to be one of incontestable fact, that Mrs. May *was* "permanently separated" from appellee Anderson on or before January 1, 1947 (*i. e.*, at least six days before he commenced his Wisconsin divorce action on January 6, 1947), that she was then in Ohio and had the children in Ohio with her, and that, by January 1, 1947, Ohio *had* become her "place of abode" and has remained such ever since.

Thus the precise thing the courts below have held is that Ohio General Code § 7996 *does* strip a wife who is "permanently separated" from her husband of the legal power to move her children's domicil and resulting State citizenship, and perhaps also her own, *into* Ohio—that § 7996 erects an invisible barricade at the Ohio state line.

WHEREFORE: We urge that appellee Anderson has failed to show anything making against the jurisdiction of the Supreme Court of the United States and that, for the several reasons urged in appellant's jurisdictional statement, the Federal questions involved are important and substantial and the Supreme Court does have jurisdiction of this case.

Respectfully submitted,

RALPH ATKINSON,
F. W. SPRINGER,
Attorneys for Appellant.

(3182)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 244

LEONA ANDERSON MAY,

Appellant,

vs.

OWEN ANDERSON

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF APPELLANT

RALPH ATKINSON,
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Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 244

LEONA ANDERSON MAY,

Appellant,

vs.

OWEN ANDERSON

APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF APPELLANT

Opinions Below

The memorandum opinion of the Supreme Court of Ohio has been officially published. *Anderson* v. *May* (1952), 157 Ohio St. 436, 105 N. E. 2d 648.

The Court of Appeals' opinion has not been published in the official Ohio Appellate Reports. It has, however, been published. *Anderson* v. *May* (1952), 107 N.E. 2d 358, 62 Ohio Law Abst. 324, 48 Ohio Op. 132.

The Probate Court's opinion has not been published.

For the Court's convenience, the opinions of the courts below were kept in type from the Jurisdictional Statement and are reprinted in the appendix to this brief.

GROUNDS OF JURISDICTION STATED

Nature and History of Case

This case originated in the Probate Court of Columbiana county, Ohio on July 5, 1951, as a habeas corpus action by Owen Anderson, father of Ronald, Sandra and James Anderson, minors under 14, to obtain possession of said children from their mother, the appellant Mrs. May. It was brought to enforce against her, *in Ohio*, a purported *Wisconsin* award to plaintiff Anderson of the children's custody, made in a Wisconsin divorce case also brought by plaintiff Anderson.

The Issue

Habeas corpus is a strictly "legal" remedy in Ohio. *Ohio General Code*,[1] § 12161.[2] And, in Ohio, a mother's "legal" right to possession of her children is "equal" to their father's. *Ohio General Code*, §§ 8032[3] and 10507-8 (114 Ohio Laws 385).[4]

Thus, since habeas corpus cannot in Ohio be used to determine chancery questions concerning the welfare of children, and since nothing short of a valid judicial award of children's custody to one of their parents can give that parent a "legal" right to possession of his children *superior* to the "legal" right of the other parent, the only

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[1] All citations to the *Ohio General Code* are citations to the official "General Code of Ohio of 1910", with the following exceptions: Where the section number is followed by a citation to the official "Laws of Ohio", cited thus, "— Ohio Laws —", the section is more recent than 1910 and will be found in the *Laws of Ohio* in the volume and at the page indicated.

[2] § 12161. A person *unlawfully* restrained of his liberty, or a person entitled to the custody of another, of which custody he is *unlawfully* deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation."

[3] § 8032 became § 8005-3 in a recodification of the domestic relations laws of Ohio effective August 28, 1951, after the beginning of this litigation. (124 *Ohio Laws* 195.)

[4] §§ 8032 and 10507-8 are quoted in the margin on page 51 below, notes 45 and 45a.

purpose for which habeas corpus can be used between parents in Ohio is the purpose for which it is employed here, namely, to *enforce* a purported prior award to the plaintiff parent of the children's custody; and the only issue possible is the *issue* here, namely, the *validity* of the purported prior award. *In re Corey* (1945), 145 Ohio St. 413, 61 N.E. 2d 892.[5]

Hence, the concurring opinion in the Court of Appeals of Columbiana county to the contrary notwithstanding,[6] the question of what custody award the welfare of the children in this case requires, not only *was not* tried in this case, but, to appellant's regret, it *could not* be tried in this case. The sole issue that *could* be tried, and the only issue that *was* tried, was the validity of the purported Wisconsin award and its consequent title, or lack of title, to "full

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[5] Cf., *Finlay* v. *Finlay* (1925), 240 N.Y. 429, 148 N.E. 624, 40 A.L.R. 937. But see *New York ex rel. Halvey* v. *Halvey* (1947), 330 U.S. 610, 91 L. ed. 1133, 67 S. Ct. 903.

[6] The Presiding Judge of the Court of Appeals dissented from the majority's holding that the Wisconsin court had jurisdiction, but concurred in affirming the judgment of the Probate Court on the ground that the Probate Court's judgment was in effect an award of custody to the father and that the "evidence" showed such an award to be "for the best interests of the children."

As is evident from the text, no evidence was admissible on any such subject. None was admitted! As the trial court states in its opinion (R. 25):

> "In passing it might be stated that this entire Habeas Corpus proceeding is based upon the Wisconsin decree of divorce, granting custody and control of said children to the father, or Petitioner, in this case."

And, although the reporter did not take it, the trial court explicitly warned counsel that the pleadings raised but one issue, namely, the jurisdiction of the Wisconsin court to make the purported custody award in question, and that they were to confine themselves to it. Since the issue of the children's welfare was not tried, it is unfair to plaintiff Anderson to draw any inference as to that issue from evidence that came in on other issues, although the fair inference, if any were to be drawn, would certainly be the opposite of that stated in said concurring opinion.

faith and credit" under Article IV, § 1 of the Constitution of the United States.[7]

The following facts pertinent to the validity of the purported Wisconsin award are undisputed:

Summary of Facts

Originally, the parties and their children lived in Wisconsin, where the mother and children had been born. The mother removed to Ohio with the children. Admittedly, she thereupon became (and still is) domiciled in Ohio. Subsequently, plaintiff Anderson filed his divorce case in Wisconsin. Throughout the Wisconsin case, the children were living and physically present with their mother in Ohio. There was no service of any kind on the children, who were not made parties, and only substituted service on the mother, had by handing her a Wisconsin summons in Ohio. There was no appearance in the Wisconsin case by either the mother or the children.

Questions Reserved in Halvey Case

This case thus presents two of the questions reserved by this Court in *New York ex rel. Halvey* v. *Halvey* (1947), 330 U.S. 610, 615-6, 91 L. ed. 1133, 1136, 67 S. Ct. 903, 906-7, namely:

First, can a court have jurisdiction to award a child's custody when the child is outside the State at the time the court enters its decree and the court has jurisdiction neither of the child's person nor the person of the parent who has the child with him outside the State?

Second, there having been only constructive service on the parent who has the child outside the State, is that parent in any way bound by the custody decree?

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[7] § 1. "Full faith and credit shall be given in each State to the public acts, records, and *judicial* proceedings of every other State. . . ."

Holdings of the Courts Below

The trial court, which each intervening court has either expressly or in effect affirmed, answered both the foregoing questions in the affirmative, an answer contrary to the answer seemingly indicated by the first two of the three concurring opinions in the *Halvey* case, *supra*.

The specific grounds on which the trial court sustained plaintiff Anderson's demand for "full faith and credit" for the purported Wisconsin award are these:

It held that mere "domicil" of a child or incompetent[8] in a State, *of itself and without more*, gives the courts of that State jurisdiction to award his custody, even though he is physically present in and thus within the sole power of another State or country hundreds or thousands of miles away! Next, the trial court held that § 7996,[9] *Ohio General Code*, vests legal power to control the domicil of the children of a marriage exclusively in the husband and father and denies the children's mother the power to affect or alter her children's domicil in any way without their father's authority and consent.

It then found as a fact (R. 30, 82)[10] that plaintiff Anderson did not consent to or authorize a change in the children's domicil from Wisconsin to Ohio.

It is evident that, if the two holdings set forth above

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[8] As will appear below, the jurisdiction to adjudicate minors and other incompetents to be such and commit them to custody, is regarded and treated by the *Restatement of Conflicts*, and by all authorities as far as we can discover, as a single integral whole with respect both to the foundations of the jurisdiction and the requisites for jurisdiction.

[9] "§ 7996. The husband is the head of the family. He may choose any reasonable place or mode of living and the *wife* must conform thereto."

[10] Throughout, the record page references are to the pages of the transcript of the record prepared by the Clerk of the Supreme Court of Ohio to forward to the Clerk of the Supreme Court of the United States, this Court having on November 17, 1952 granted leave to proceed on the typewritten record.

were correct, it would follow from said finding of fact that the children's domicil remained in Wisconsin, that the Wisconsin court had jurisdiction to award their custody as it saw fit, and that its purported award was valid and entitled to "full faith and credit." The trial court so found and granted enforcement of said purported award, ordering Mrs. May, in whose custody the children had been remanded at the outset, to deliver them to plaintiff Anderson.

FEDERAL QUESTIONS WERE RAISED

In holding that the bare "domicil" of a person within a State gives its courts jurisdiction to adjudicate him to be a minor or incompetent and make an order purporting to commit him to custody—even where he is outside the State and its courts have jurisdiction neither of his person nor of the person of the individual, if any, in whose custody he is—the trial court sustained a contention by plaintiff Anderson.

Mrs. May had opposed this contention strenuously, urging that any such proposition must, of necessity, rest on doctrines unknown to the law of a free country, and violate principles of public law respecting the jurisdiction of courts, generally accepted in the Western world, that are deeply embedded in the Federal Constitution. Specifically, she contended that she and the children alike are constitutionally immune to any extension of "full faith and credit" to the purported Wisconsin award for the reasons:

(1) That it is implicit in Article IV, § 1 that "full faith and credit" is due a judgment or decree only if, according to the principles just mentioned, it has been made "*with* jurisdiction" (possibly because, otherwise, the proceedings in which it is made are not truly "judicial"). *D'Arcy* v. *Ketchum* (1850), 11 How. 165, 13 L.ed. 648. *Thompson* v.

Whitman (1874), 18 Wall. 457, 21 L.ed. 897. *Pennoyer* v. *Neff* (1878), 95 U.S. 714, 24 L.ed. 565.

(2) That any construction of Article IV, §1 to require "full faith and credit" for said purported award when made *without* jurisdiction, according to those principles, would render Article IV, §1 repugnant to the 5th Amendment, which protects both Mrs. May and her children from being deprived by Federal action of their liberty without due process of law. And

(3) That by enforcing against her and the children a decree which, according to civilized principles of jurisdiction, was made without jurisdiction, *Ohio* would deprive her and the children of their liberty without due process of law, contrary to the 14th Amendment. *Pennoyer* v. *Neff*, above. *Griffin* v. *Griffin* (1945), 327 U.S. 220, 228-9, 90 L.ed 635, 640, 66 S.Ct. 556, 560.

Mrs. May likewise argued strenuously that if §7996 *Ohio General Code* were construed to take from her the legal power to alter her children's domicil, without plaintiff Anderson's authority and consent, it would, as thus construed and applied, violate each and every provision of §1 of the 14th Amendment.

The arguments in the trial court are of course not part of the record. *Before* judgment in that court, however, the substance of Mrs. May's foregoing contentions was reduced to record as Mrs. May's exception 4 to the trial court's separate findings of fact and law (R. 77-82) as follows (R. 83-4):

> "Defendant Leona Anderson May excepts * * * (4) To the findings of law contained in paragraphs b, c and e, and to the portion of the findings of law contained in that part of paragraph d that begins with the words "The plaintiff husband in this case" and continues to the end of said paragraph d, on the ground that they are contrary to law, involve an erroneous application

to this case of Article IV, §1 of the Constitution of the United States, are repugnant to the 5th Amendment and §1 of the 14th Amendment to said Constitution, and so construe and apply General Code §7996 as to render that statute repugnant to said § 1 of said 14th Amendment." (R. 83-4).

The trial court overruled said objections by entering judgment against Mrs. May (R. 113).

After judgment in the trial court, Mrs. May renewed said objections by a motion for new trial (R. 85-6), which the trial court overruled (R. 86). The wording in the motion for new trial was virtually identical with that just quoted, except that the objections were now directed also to "the judgment of the Court, which is based on said findings".

The Court of Appeals

From the Probate Court, Mrs. May appealed to the Court of Appeals of Columbiana county, Ohio. There she raised said objections at the outset in her assignment of errors (R. 106). The assignment of errors copies almost verbatim the language already quoted above from Mrs. May's exceptions and motion for new trial. The Court of Appeals overruled said assignments of error by affirming the judgment of the Probate Court (R. 100).

The Supreme Court of Ohio

Mrs. May appealed from the Court of Appeals to the Supreme Court of Ohio both of right, on the ground that Federal constitutional questions were involved, and also on condition that a "motion to certify" (a discretionary remedy similar to certiorari) be allowed by said court (R. 99). Mrs. May again raised said constitutional objections at the outset in her assignment of errors (R. 95-6), of which the pertinent portions read as follows:

"3. The Court of Appeals misconstrued and misapplied §1 of Article IV of the Constitution of the United States, and, further, so construed and applied said section as to render the same repugnant to the 5th Amendment and to §1 of the 14th Amendment to said constitution; and, in doing each, the court erred.

"4. The Court of Appeals erred in that its judgment in this case is repugnant to §1 of the 14th Amendment to the Constitution of the United States, and, further, in that said judgment sustains a construction and application by the Probate Court of §7996 (now §8002-2) of the Ohio General Code that renders said statute repugnant to said §1 of said 14th Amendment."

On March 27, 1952, the case was heard before a full bench consisting of six Judges and the Chief Justice.

On April 2, 1952, with three judges—Stewart, Taft and Zimmerman, J.J.—not concurring;[11] the Supreme Court of Ohio passed on Mrs. May's said assignments of error by dismissing her appeal of right on the ground that "no debatable constitutional question is involved." 25 *Ohio Bar* 198. *Anderson* v. *May* (1952), 157 Ohio St. 436, 105 N.E. 2d 648. The court also overruled Mrs. May's motion to certify. 25 *Ohio Bar* 199.

On April 16, 1952, within the fourteen days allowed by Rule XX of the Supreme Court of Ohio (147 Ohio St. lxxv), Mrs. May exhausted her state remedies by duly filing an application for rehearing, which, on April 23, 1952, was denied. 25 *Ohio Bar* 273.

On July 1, 1952, being within 90 days after the adverse judgment of the Supreme Court of Ohio on April 2, 1952 and the denial of her application for rehearing on April 23, 1952 (28 U. S. C., § 2101(c)), Mrs. May duly filed with the Clerk of the Supreme Court of Ohio her petition for appeal to this Court, and her accompanying assignment

[11] The Supreme Court of Ohio admits a case only if an absolute majority of the members sitting votes to admit.

of errors and jurisdictional statement, and presented the same for allowance to the Chief Justice of the Supreme Court of Ohio, who that day allowed the appeal.

On October 13, 1952, this Court noted probable jurisdiction, 73 S. Ct. 43.

As previously stated, the children were remanded in Mrs. May's custody at the outset. (See appendix, page a1 below.) The judgments of the trial court and Court of Appeals requiring her to surrender the children to plaintiff Anderson were at once superseded by filing proper supersedeas bonds. The Supreme Court of Ohio graciously stayed the issuance of its mandate to allow the perfecting of this appeal. On the allowance of this appeal, supersedeas bond was again duly fixed and filed. The children therefore remain in Mrs. May's custody under the trial court's preliminary order pending the final action of this Court.

Statutes Believed to Sustain Jurisdiction

The statutes believed to sustain this Court's jurisdiction in this case are the following, each of which is quoted from Title 28, *United States Code:*

> "§1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."
>
> "§2103. If an appeal to the Supreme Court is improvidently taken from the decision of the highest

court of a State in a case where the proper mode of review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted upon as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. * * *"

(The attorneys for Mrs. May believe, as will appear, that the jurisdiction on appeal is clear. That, however, does not excuse them from claiming for her the benefit if needed of the important curative statute last quoted.)

Jurisdictional Questions; Authorities Cited

I. Judgment of Highest State Court?

A judgment of the Supreme Court of Ohio dismissing an appeal of right on Federal constitutional questions on the ground that "no debatable constitutional question is involved" is a judgment of the highest court in Ohio "in which a decision could be had" on the merits of the constitutional questions presented and, if final, is reviewable by the Supreme Court of the United States. *Tumey* v. *Ohio* (1927), 273 U.S. 510, 71 L.ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243. *Van Huffel* v. *Harkelrode* (1931), 284 U.S. 225, 76 L.ed. 256, 52 S.Ct. 115, 78 A.L.R. 453. *Haley* v. *Ohio* (1948), 332 U.S. 596, 92 L.ed. 224, 68 S.Ct. 302.

II. A Final Judgment?

The Probate Court rendered judgment against Mrs. May for the surrender of the children to plaintiff Andersen. Said judgment left nothing further to be done and concluded the litigation. It was therefore "final." *Radio Station WOW, Inc.* v. *Johnson* (1945), 326 U.S. 120, 89 L.ed. 2092, 65 S.Ct. 1475.

The effect of the judgments of the Court of Appeals and the Supreme Court of Ohio being simply to confirm the judgment of the Probate Court, they also would seem clearly "final."

III. "Right, Privilege or Immunity" Claimed?

As we have seen, the issue in this case is whether the purported Wisconsin award of the custody of the children in this case is valid and therefore entitled, under Article IV, §1 of the Federal Constitution, to "full faith and credit" and enforcement in Ohio. The issue arose as follows:

Invoking Article IV, §1, plaintiff Anderson produced the purported Wisconsin award and demanded "full faith and credit" for it. Mrs. May, quite apart from her complaint against §7996, *Ohio General Code*, defended on the ground that she and the children were immune to any extension of "full faith and credit" to said purported award because, according to principles (a) implicit in Article IV, § 1 itself, (b) imposed on the United States by the 5th Amendment and (c) imposed on both Wisconsin and Ohio by §1 of the 14th Amendment, the purported award was made without jurisdiction and was therefore void.

Thus, from the start, each of the parties has claimed a "right, privilege or immunity" under the Federal Constitution. It is believed, therefore, that even if the validity of a State statute were not involved, the Supreme Court of the United States would have jurisdiction at least to grant certiorari.

IV. Validity of a State Statute Drawn in Question?

As previously shown, Mrs. May has in every court attacked the validity of §7996, *Ohio General Code*, on the ground that, as construed and applied in this case, it is

repugnant to §1 of the 14th Amendment. The statute reads as follows:

> "§7996. The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto."

The official publication of this statute is in the General Code of Ohio of 1910, page 1702. In a recodification of the domestic relations laws of Ohio, effective August 28, 1951 (after the beginning of this litigation), it became §8002-2, *Ohio General Code*. 124 *Ohio Laws* 183.

V. Judgment "in Favor of" Validity?

As already pointed out, the State judgment is that §7996, above, deprived Mrs. May of the legal capacity to change her children's domicil from Wisconsin to Ohio, that, because of this, the children's domicil remained in Wisconsin, and that because their domicil remained in Wisconsin, Wisconsin had jurisdiction to make its purported award of their custody.

Had the Ohio courts held §7996 invalid, or even construed it differently, they would have been forced to find that the children were domiciled in Ohio, not Wisconsin, during the pendency of the Wisconsin case, that Wisconsin was thus without jurisdiction, and that its purported custody award was therefore void and entitled to no faith or credit whatever—which would have led to the opposite result from the one reached.

Thus the decision of the Ohio courts was a decision "in favor of" the validity of §7996, Ohio General Code.

Jurisdictional Questions; Conclusion

For the foregoing reasons, it is urged that all purely technical requirements for jurisdiction are satisfied. We therefore turn to the merits.

STATEMENT OF THE CASE [12]

The appellant, Mrs. May, was born in Wisconsin (R. 21). There, in the middle 1930's, she married the plaintiff, Owen Anderson (R. 21). He had come from near Lisbon, Ohio, where his people still live (R. 40-62).

Following their marriage, appellant and plaintiff lived in Waukesha, Wisconsin and there had three children (R. 21), Ronald, born December 18, 1938, Sandra, born July 26, 1942, and James, born August 7, 1945.

Some time before or during the year 1946, serious marital troubles developed (R.14). In December, 1946, the parties agreed that appellant should go with the children to Lisbon, Ohio, where she, plaintiff and the children had often visited, there to be alone to think out the problem the parties' difficulties had created (R. 9, 14). However, the trial court finds it was the "understanding" of the parties (R. 79-80), or at least of plaintiff Anderson (R. 23-4), that appellant's stay in Ohio would be only "temporary," and that she would return to Waukesha with the children before anything "permanent" was done. (Appellant has attacked these findings throughout as both contrary to the manifest weight of the evidence, R. 83, and in conflict with the trial court's own finding elsewhere.)[13]

Appellant came to Ohio with the children on December 26, 1946 (R. 9.). After three or four days in Lisbon had given

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[12] In the courts below, counsel for plaintiff Anderson accepted the statement we there made of the facts as accurate and complete. That statement has of course had to be pruned drastically for use here. We have tried to include, however, an accurate statement of all facts still pertinent.

[13] Appellant testified that, when she left, plaintiff Anderson told her she must decide either to "come back to him or separate" (R. 14), and, answering a question on cross examination as to her then state of mind, testified, "At the time I left, I really didn't know what I was going to do" (R. 17). The courts below *believed* her testimony: The trial court finds (R. 28), "When she left Wisconsin, it was undecided whether she was going to stay or come back." And the Court of Appeals says (107 N.E. 2d, 361), "She was uncertain as to her ever coming back."

her the chance she sought to think quietly, she made up her mind not to go back to Wisconsin, but to stay in Lisbon, Ohio permanently, and she settled down there with the three children to live (R.12, 21-2). She has lived in Lisbon ever since (R.21).

On New Year's day, 1947, plaintiff Anderson, in Wisconsin, called appellant, in Lisbon, by telephone (R.12). During the conversation appellant exclaimed, "Owen, I'm not coming back!" During this conversation or another in the next day or two — so plaintiff Anderson claims (R. 9, 12) and the trial court finds (R. 30) — he demanded that she return the children to Wisconsin and she refused to return them. (*I.e.*, it is his own testimony, found by the courts below to be true, that from this time forward, what he claims was originally a "temporary" visit by appellant and the children to Ohio had—without his consent or authority, to be sure—in fact become a *permanent* stay there.[14] Indeed he has stipulated, with respect to appellant (R. 21-2), that appellant's *domicil* became Ohio when, in the closing days of 1946, she decided not to go back to Wisconsin, but to settle down with the children to live in Lisbon.).

In the final telephone conversation, on Sunday, January 5, 1947, plaintiff Anderson told appellant (R. 15), "Tomorrow, you are due for one of the biggest surprises of your life."

On January 6, 1947, plaintiff filed a petition against appellant for divorce in the County Court of Waukesha coun-

[14] As we have seen, the courts below have so construed and applied *Ohio General Code* § 7996 as to deprive Mrs. May of the *legal power* to change her children's home from Wisconsin to Ohio. Because of their construction of § 7996, the constitutionality of which is one of the two main questions in this case, the courts below hold that, as a matter of *law*, the children's absence from Wisconsin was only "temporary". The object of the parenthetical passage in the text is to dissociate this conclusion of law from the facts.

ty, Wisconsin (R. 12, 15). Appellant was the only defendant (R. 90); the children were *not* made parties.

Appellant and the children continued to live in Lisbon, Ohio (R. 22), and, shortly thereafter, the Wisconsin court caused a Wisconsin summons and a copy of plaintiff Anderson's petition to be delivered to appellant *in Ohio* (R. 22). This was the *only* service in the Wisconsin case (R.22).

One of the children was ill and appellant was without money when she received the papers from Wisconsin (R. 16, 19). She sought the advice of counsel at once, however, and was told to keep out of the Wisconsin case and stay with the children in Ohio (R. 15)—which advice [15] she followed (R. 22).

On February 5, 1947, a day less than a month after plaintiff Anderson had filed his petition, the Wisconsin court granted him a divorce (R. 22). Its decree (R. 90) contained, among other things, this paragraph:

> "It is further ordered, adjudged and decreed that the care, custody, management and education of the minor children of the parties be and is hereby awarded to the plaintiff, subject to the right of the defendant to visit the children at any and all reasonable times."

This is the part of the decree that plaintiff Anderson brought this action to enforce. The entry of the decree puts a period to the facts pertinent to its validity,[16] the issue here.

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[15] We were not the lawyers Mrs. May consulted at this point. However, as will appear, the advice she received was supported by the virtually unanimous holdings of the State courts of last resort, as well as by all the standard legal encyclopedias. *E.g.*, 19 *Corpus Juris*, 341, § 790, 27 *Corpus Juris Secundum*, 1163, § 303(b). 14 *Ohio Jurisprudence*, 552-3, § 149.

[16] The further history of the case, which is of some interest, may be briefly stated as follows:

Late in February, 1947, plaintiff and a village police officer appeared at the children's and appellant's home in Lisbon armed with a copy of

SPECIFICATION OF ERRORS

Appellant urges each of the errors specified in her Assignment of Errors, to wit:

"1. In dismissing appellant's appeal for lack of a debatable constitutional question instead of reversing the judgments of the Probate Court and Court of Appeals and entering final judgment for appellant, the Supreme Court of Ohio erred.

"2. By dismissing on the ground that appellant's appeal did not present a debatable constitutional question, the Supreme Court of Ohio:

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said decree (R. 10, 23, 78-9). Together, plaintiff and the policeman got possession of the children and plaintiff at once removed them to Wisconsin (R. 23).

Originally, the facts were stipulated (R. 6, 21). In consequence, the record is silent concerning appellant's efforts to recover her children during the next four years and her contacts with them except for a stipulation (R. 23) that she never submitted to Wisconsin's jurisdiction by appearing in the case there.

As for the parties, plaintiff Anderson shortly remarried (R. 57) and has another child (R. 49). Appellant also remarried, becoming Mrs. James F. May (R. 48), but has no other children.

On July 1, 1951, plaintiff Anderson returned to Lisbon with the children on a visit to his people (R. 23, 40-61). He let the children go to the home of their mother, the appellant Mrs. May, and, on the advice of counsel, she refused to surrender them (R. 23).

On July 5, 1951, accordingly, plaintiff Anderson brought this action on the purported Wisconsin award. Mrs. May appeared voluntarily with the children in open court forthwith and, after a brief preliminary hearing, they were remanded in her custody (R. 6). The order of remand (see page a1 below) forbade the children's removal from the county "until this matter is finally determined", but gave plaintiff Anderson a "right of visitation with" them.

After the case had been heard but before judgment had been entered, plaintiff Anderson had the children with him and, in defiance of the trial court's order, absconded with them to Wisconsin (R. 32, 39-62).

Ultimately, after correspondence and contempt citations had proved futile (R. 32-6), Mrs. May, acting in precise accordance with instructions given her by her present counsel, effected a recovery of the children from Wisconsin (R. 45-71).

The trial court thereupon entered its judgment against Mrs. May (R. 75-6). As previously stated, its judgment was at once superseded by appropriate supersedeas bond and Mrs. May now holds the children in accordance with the original order of remand just referred to.

"a. Held that the purported custody award of the County Court of Waukesha county, Wisconsin was a valid award made with jurisdiction and was therefore entitled to 'full faith and credit' under Article IV, §1 of the Constitution of the United States; and, in so holding, the Supreme Court of Ohio erred.

"b. Misconstrued and misapplied Article IV, §1 of the Federal Constitution, and, further, so construed the same as to render it repugnant to the 5th Amendment and §1 of the 14th Amendment; and, in doing each, said court erred.

"c. So construed and applied §7996 of the General Code of Ohio of 1910 as to render that statute repugnant to § 1 of the 14th Amendment: and, in so doing, the court erred.

"3. The judgment of the Supreme Court of Ohio directed that appellant's children be taken from her on the sole strength of a purported custody award made without jurisdiction, and said judgment is therefore repugnant to §1 of the 14th Amendment.

"4. The Supreme Court of Ohio erred prejudicially to appellant in other respects manifest from the face of the record."

ARGUMENT

Exact Scope of Questions

The "domicil" or "legal settlement" of a person, the place of which he is an "inhabitant", is presumably the place where he "resides" within the meaning of the first sentence of the 14th Amendment:

> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they *reside*."[17]

[17] *Milliken v. Meyer* (1940), 311 U.S. 457, 463-4, 85 L. Ed. 278, 283-4, 61 S. Ct. 339, 343.

Because of the ambiguity of "residence", it is "domicil" that is used throughout this statement to mean this connection with a State which, in the case of a citizen of the United States, makes him a citizen of the State also and gives the State such jurisdiction of him as arises out of his consequent allegiance to it.

This mention of the effect of domicil on State citizenship and allegiance is made here because the recent decision of the Supreme Court of the United States in *Harisiades* v. *Shaughnessy* (1952), 342 U.S. 580, 72 S. Ct. 512, may affect sharply the jurisdictional significance of "domicil" when considered by itself:

The jurisdictional import of "domicil" in a context such as this [18] appears to have rested wholly on an assumption that, when a person makes his home in a State or country and it permits him to remain there, he thereby undertakes allegiance to it [19] and it thereby accepts his allegiance,[20] an allegiance qualified only by his continuing technical allegiance to the country of which he is a citizen or subject. In a country where this assumption is true, it follows that the country acquires (subject to the qualifications implicit in the qualification just stated) the same rights, jurisdiction and duties with respect to him, including the duty of protection, as it has in the case of its nationals.[21]

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[18] As is evident, what we are concerned with in this case is jurisdiction to adjudicate alleged minors and incompetents to be such and commit them to custody—a matter of exclusively common law and chancery cognizance. We are in no way concerned with the utterly alien principles of the canon law that govern jurisdiction in divorce and jurisdiction to probate wills and grant letters testamentary and of administration.

[19] As is made clear by *Blackmer* v. *United States* (1932), 284 U.S. 421, 76 L. ed. 375, 52 S. Ct. 252, and by the comments on it in *Milliken* v. *Meyer*, note 17 above, jurisdiction over an absentee rests, *not* on power, but on *duty*—the duty imposed on the absent person by his *allegiance* to the State or country from which he is absent.

[20] *United States* v. *Wong Kim Ark* (1898), 169 U.S. 649, 655, 658, 42 L. ed. 890, 893, 894, 183 S. Ct. 465.

[21] *Ibid.*

The *Harisiades* case, however, appears to hold, quite flatly, that by acquiring a domicil here, a non-citizen acquires no more rights and incurs no more obligations than does a foreign tourist. A necessary corollary would seem to be that the bare "domicil" of a person in the United States confers no more *jurisdiction* over him than there is over a tourist who has passed through.

Thus, it becomes important that Mrs. May and her children were all born in the United States (R. 21), have at all times been "subject to the jurisdiction thereof" (R. 21-3), and are therefore all *citizens*.[22]

Because they are citizens, the jurisdictional significance of *bare* domicil is not what we are concerned with in this case. In January and February, 1947, each of them, because he was a citizen of the United States, also was a citizen of and therefore did owe *allegiance* to a State, which, on the facts here, was either Ohio or Wisconsin.

The "domicil" of each of them, the place where he was then "residing" within the meaning of §1 of the 14th Amendment, is, regardless of the interpretation properly to be put on the *Harisiades* case, still significant, although perhaps only because it determined for each of them which of those States was then the State of his citizenship and State allegiance. Thus, the Federal questions in this case are these:

The Federal Questions

1. Where a citizen of the United States, domiciled in and consequently a citizen of Ohio, is served *in Ohio* with a *Wisconsin* summons, does the Wisconsin court thereby acquire jurisdiction of the *person* of the Ohio defendant?

2. Can it be held, compatibly with the principles of public law respecting the jurisdiction of courts that are implicit in Article IV, §1 of the Federal Constitution and are protected against Federal violation by the 5th

[22] *United States v. Wong Kim Ark*, above, note 20.

Amendment and against State violation by §1 of the 14th Amendment, that the bare domicil and consequent citizenship in a State of a citizen of the United States who is no longer present in the State, give the courts of that State jurisdiction, without notice to him, to adjudicate him to be a minor or incompetent and make an order purporting to commit him to custody?

3. When so construed as to take from a wife who is a citizen the liberty and power to change her own or her children's domicil and consequent State citizenship from another State *into* Ohio, is Ohio General Code §7996 repugnant to §1 of the 14th Amendment to the Federal Constitution?

Summary of Argument

Actually, the questions just stated contain a summary of appellant's argument. As we have seen, the judgment of the courts below rests on two pedestals:

They hold (1) that if the domicil and state citizenship of these children was in Wisconsin, that fact, alone and without more, gave Wisconsin jurisdiction to commit them to custody, and (2) that *Ohio General Code* §7996 erects an invisible fence around Ohio through which a married woman cannot move the domicil and State citizenship of her children *into* Ohio without their father's consent.

These holdings drove the courts below to conclude (a) that the children's domicil remained in Wisconsin, and (b) that their commitment to custody by Wisconsin was valid and therefore entitled to "full faith and credit." That is their judgment.

As is evident, the judgment of the courts below requires *both* pedestals to support it. If either gives way, the judgment collapses.

Our argument is the essence of simplicity. We contend *each* pedestal is fractured. Specifically, we contend:

(1) That the first holding violates principles implicit in the "full faith and credit" clause itself, principles that are

also protected by the 5th Amendment against Federal violation and by §1 of the 14th Amendment against State violation.

(2) That the second holding achieves the remarkable feat of rendering §7996 repugnant to each and every clause of §1 of the 14th Amendment.

FIRST QUESTION

The courts below have answered the first question in this case by holding, we believe correctly, that serving a Wisconsin summons in Ohio on a citizen of Ohio does *not* give the Wisconsin court jurisdiction of the person of the Ohio defendant.

At this point in the jurisdictional statement, we stated, "To our surprise, although the Supreme Court of the United States has often enough *said* that such is the law, *e.g.*, in *Pennoyer* v. *Neff* (1878), 95 U.S. 714, 24 L.ed. 565, [568-9, 570,] we do not find that it has ever actually *decided* the point."

We discover that our research was inadequate. The precise point was decided in *Bischoff* v. *Wethered* (1870), 9 Wall. 812, 19 L. ed. 829 (first L. ed. headnote and first paragraph of opinion). And nothing said since in any way impairs its authority. See, in addition to *Pennoyer* v. *Neff*, above, *Galpin* v. *Page* (1874), 18 Wall. 350, 21 L. ed. 959, 963, *Baker* v. *Baker, Eccles & Co.* (1917), 242 U. S. 394, 401-3, 61 L. ed. 386, 392, 37 S. Ct. 152, and *McDonald* v. *Mabee* (1917), 243 U. S. 90, 61 L. ed. 608, 37 S. Ct. 343.

SECOND QUESTION

The next question in this case is whether the domicil and consequent citizenship in a State of a United States citizen who is not present there, are enough, alone and without more, to give the courts of the State jurisdiction to adjudi-

cate him to be a minor or incompetent and make an order purporting to commit him to custody. This question appears never to have been decided by the Supreme Court of the United States.[23]

Narrowness of the Question

The extreme narrowness of the question is the first thing to be noted.

No Jurisdiction in Personam

As will be observed, the Wisconsin court had no jurisdiction of anyone's person except plaintiff Anderson's.

(A) It had no jurisdiction of Mrs. May's person. As was long ago said in *Pennoyer* v. *Neff*, above:

> "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them."

(B) The Wisconsin court had no jurisdiction of the persons of the children: They were not named parties to the Wisconsin case. There was no service on them of any kind.[24]

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[23] This Court's closest approach to this question seems to have been in *Chaloner* v. *Sherman* (1916), 242 U.S. 455, 61 L. ed. 427, 37 S. Ct. 136, which involved the validity of the appointment of a successor guardian for an allegedly incompetent adult. The Court *assumed* that the original adjudication of the appellant to be a mental incompetent and his original commitment to custody would have been totally *void* had the trial court not first obtained jurisdiction of his person.

The Supreme Court of the United States' only other approach to the question prior to *New York ex rel. Halvey* v. *Halvey* (1947), 330 U.S. 610, appears to have been in connection with *Seeley* v. *Seeley* (1907), 30 App. D.C. 191, 12 Ann. Cas. 1058, in which the Court of Appeals of the District of Columbia *denied* "full faith and credit" to a purported Illinois award of a child's custody, made while the child was in the District of Columbia. The Supreme Court of the United States *denied* certiorari, 209 U.S. 544, 52 L. ed. 919, 28 S. Ct. 570.

[24] We do not concede that service on the children *outside* Wisconsin could have given the Wisconsin court jurisdiction of their persons, even

Thus, since the Wisconsin court acquired no jurisdiction of the persons of *either* the children or Mrs. May, the question is whether the Wisconsin court in any way acquired *in rem* jurisdiction of the children, so as to be able to determine the rights respecting the children of the children themselves, of Mrs. May, and indeed of all the world, *without* jurisdiction of any of their persons.

No Jurisdiction in Rem of Children's Bodies

As we have seen, the Wisconsin court did not have the children in its possession or in that of its officers, and did not have jurisdiction of the person of the individual who *did* have possession of the children. Nor were the children in Wisconsin, dubious as their mere presence in the State would have been as a foundation of jurisdiction under the holding in *Pennoyer* v. *Neff*.[25] The Wisconsin court did not

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assuming them to have been citizens of Wisconsin. As previously stated, *Blackmer* v. *United States* (1932), 284 U.S. 421, 76 L. ed. 375, 52 S. Ct. 252, and *Milliken* v. *Meyer* (1940), 311 U.S. 457, 85 L. ed. 278, 61 S. Ct. 339, make it clear that obtaining jurisdiction of the *person* of an absent citizen by service on him *outside* the jurisdiction rests, *not* on power, but on *duty*—a duty imposed on him by his allegiance to the State of which he is a citizen to return in obedience to its summons. But when the complaint against him is that he is a minor or mental incompetent and ought to be committed to custody, where is the duty? The allegation of minority or other incompetence has to be either true or false. If it is true, the alleged minor or incompetent can hardly be presumed capable of grasping what is expected of him, nor can it be presumed that he is physically free to return. If, on the other hand, the allegation is false and he is in truth perfectly competent, what "duty" has he to return and defend himself against a charge that he is not? Obviously, *he* is not a transgressor, on either state of the facts. And, if the charge is false, he is transgressed against.

[25] We can think of no case where the bare presence of an object in a State gives a *court* actual *judicial* jurisdiction of the object. We think of two cases where an object's presence in a State gives the *State*, as such, something that is sometimes *called* "jurisdiction" of it, namely, the authority to tax it, and the authority, in the event of its owner's death,

even have the attenuated control over them that would have existed if, outside the State, they had been in the possession of plaintiff Anderson's servants.[26] Thus, plainly, the Wisconsin court did *not* have jurisdiction *in rem* of the children, considered as physical objects.[27]

Jurisdiction of Any Other Res?

Did it have such jurisdiction of any other *res* as would empower it, consistently with the principles of jurisdiction embedded in the Federal Constitution, to cut off Mrs. May's rights respecting her children, and the children's rights respecting her, by committing them to plaintiff Anderson's exclusive custody?

The only possibility of such a *res* lies in an analogy to divorce. It is now settled that the "personal relationship"

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to administer upon it. But such "jurisdiction" is nothing but the authority of a State to have *laws* to which things inside its territory are subject.

[26] In *Hughes* v. *Hughes* (1947), 180 Ore. 575, 178 P. 2d 170, a divorce case, the court had some question about its jurisdiction to make a custody award because the child was in camp in British Columbia. Both parents were in court, however, and the court held that since the parent who had the child in camp was personally before it, it had jurisdiction to proceed, apparently on the ground that the child was in fact within its actual control.

[27] A court, by bringing an object, or even an intangible thing like a debt, within its actual control, and by giving all interested persons such reasonable notice as the nature of the case requires, acquires power to adjudicate the rights of every person in the world in that thing, and to confirm or cut off such of those rights as it finds proper. *Cooper* v. *Reynolds* (1870), 10 Wall. 308, 19 L. ed. 931. *Overby* v. *Morgan* (1921), 256 U.S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873. *Geary* v. *Geary* (1936), 272 N.Y. 390, 6 N.E. 2d 67.

But, *until* the court reduces the thing to its control, it has no jurisdiction whatever of the thing, and therefore has no jurisdiction to adjudicate the *rights* respecting that thing of any *persons* whatever, excepting only the persons, if any, whom it has personally before it. *Thompson* v. *Whitman*, above. *Pennoyer* v. *Neff*, above. *New York Life Insurance Co.* v. *Dunlevy* (1916), 241 U.S. 518, 60 L. ed. 1140, 36 S. Ct. 613. And see *Riley* v. *New York Trust Company* (1942), 315 U.S. 343, 86 L. ed. 885, 62 S. Ct. 608.

between husband and wife, the "marriage tie" so to speak, is a *res* of which a court can get sufficient jurisdiction to cut it off by having before the court one party to the relationship who is domiciled within the court's jurisdiction and by giving the other party, wherever he may be, reasonable notice of the proceedings.

Analogizing from divorce jurisdiction to jurisdiction to adjudicate alleged minors and incompetents to be such and then commit them to custody is of course a most unsafe exercise; the latter jurisdiction rests on the jurisdictional principles of the common law and equity, not on the utterly foreign canon law principles that govern jurisdiction in divorce. Proceeding, with this *caveat*, to look for relevant "personal relationships"; two will be found in the case of children, namely, the relationship between a child and his father and the relationship between a child and his mother.

Conceivably, if there had been notice to the children, Wisconsin might have acquired sufficient jurisdiction of one of those relationships, to wit, the "personal relationship" between the children and plaintiff Anderson, to cut it off. *Yarborough* v. *Yarborough* (1933), 290 U. S. 202, 78 L.ed. 269, 54 S. Ct. 181, 90 A.L.R. 924 (in which, however, the child was personally present in open court during the proceedings).

But, even in divorce, if a court has only one of the parties before it and thus has jurisdiction of only one end of such a "personal relationship", the court's jurisdiction is limited to cutting off or curtailing the relationship. The court has no jurisdiction to increase, or even to fix, the personal obligations and burdens under it of the party to it who is absent. *Mansfield* v. *McIntire* (1840), 10 Ohio 27. *Cox* v. *Cox* (1869), 19 Ohio St. 502, 2 Am. Rep. 415; 20 Ohio St. 439. *Woods* v. *Waddle* (1886), 44 Ohio St. 449, 8 N. E. 297. *Weidman* v. *Weidman* (1897), 57 Ohio St. 101, 48 N. E. 506 (cited for its summing up of earlier cases). *Bay* v. *Bay*

(1912), 85 Ohio St. 417, 98 N. E. 109. And see *Estin* v. *Estin* (1948), 334 U. S. 541, 92 L. ed. 1561, 68 S. Ct. 1213, 1 A.L.R. 2d 1412.

No Jurisdiction of Any Other Res

Thus, after pursuing our tentative analogy to divorce jurisdiction to its logical limit, we find that all the jurisdiction the Wisconsin court *could* have got, even by giving the children notice, would have been power to *cut off* the "personal relationship" between plaintiff Anderson and the children. It could have got no power whatever to do what it purported to do, namely, *increase* the weight with which that relationship bore on the children by imposing on the children a duty to stay only with their father and forswear their mother.

In fact, there was of course *no* notice to the children. Thus the Wisconsin court can have had no jurisdiction even to cut off the relationship between plaintiff Anderson and the children.

Next, it was *not* plaintiff Anderson that the Wisconsin court purported to "divorce" from the children. It was the children's *mother*, Mrs. May!

But "divorcing" Mrs. May from her children was something the Wisconsin Court could not do, on any theory, unless it had jurisdiction of, as a *res*, the "personal relationship" between Mrs. *May* and her children. And Mrs. May and the children were not before the Wisconsin court; they were all *in Ohio*. Wisconsin, therefore, did not have hold of *either* end of that *res;* the whole of it was in Ohio. The "personal relationship" between Mrs. May and her children was therefore wholly *outside* Wisconsin's power.

Therefore, if it is jurisdiction *in rem* we are dealing with here, it is a jurisdiction *in rem* without any *res*.

Thus, the facts are such that, for the courts below to reach the result they did reach in this case, they *had* to

hold what they *said* they held, namely, that by reason of the bare domicil of these children in Wisconsin, the Wisconsin courts already had jurisdiction to dispose of the children's custody long before the children left Wisconsin and long before any case or proceeding was filed in any particular Wisconsin court (presumably from the children's birth since they were *born* domiciled in Wisconsin).[28]

Consequently, so the courts below implicitly hold, since complete and perfect jurisdiction to dispose of the children's custody was, when the children left, already attached to the children and vested in every Wisconsin court capable of receiving such jurisdiction, it is immaterial that no jurisdiction to dispose of the children's custody ever vested in this particular Wisconsin court *after* the children left. No notice, no service of process, the courts below hold, could have added anything to the jurisdiction to dispose of the children that the County Court of Waukesha county already possessed *without* notice and *without* process.[28]

The Narrow Question

Thus, the first of the two major questions here does boil down to this extremely narrow, not to say naked, question:

> Can it be held, compatibly with the principles of public law respecting the jurisdiction of courts that are implicit in Article IV, § 1 of the Federal Constitu-

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[28] The text of the holdings of the courts below is as follows. The Probate Court held (R. 31):

> "The Court further finds that, in as much as the children were legally domiciled in Wisconsin, the Wisconsin court had jurisdiction over the subject matter and could *validly* award the care, custody and control of the children • • •."

The Court of Appeals held (107 N.E. 2d, 362):

> "The children were domiciled in Wisconsin until December 26, 1946, *where the Wisconsin court had exclusive jurisdiction*, and that court did not *lose* its jurisdiction by reason of their going with their mother to Ohio • • •."

tion and are protected against Federal violation by the 5th Amendment and against State violation by §1 of the 14th Amendment, that the bare domicil and consequent citizenship in a State of a citizen of the United States who is no longer present in the State, give the courts of that State jurisdiction, without notice to him, to adjudicate him to be a minor or incompetent and make an order purporting to commit him to custody?

In a word, *can* such a jurisdiction exist here?

The Two Possible Assumptions

We urge that there are only two assumptions on which any such jurisdiction could be supported, namely:

First, that human beings are the chattel property of the State to which they are subject, and therefore that, whether they are inside that State or outside it, it has power, through its legislature or courts, to deliver a bill of sale or deed of gift of any of them to whomever it may select, which the courts of the place where he is will be bound to honor; or

Second, the assumption of the Civil law, on which most if not all Western absolutisms have been built, that supreme and uncontrolled power exists in the emperor (or State) "*eum populus ei et in eum omne imperium suum et potestatem concedit*", which we translate, probably barbarously, "because to him and in him the people have yielded up all their power and authority." In short, said assumption is, the State, whether embodied in an emperor, a king or a legislature, holds an unlimited and irrevocable power of attorney from the "people", every one of them, and if the State chooses to sell a member of the people into slavery, or execute him, no wrong has been done him because it is his own act. Legally, *he* has sold *himself* into slavery, or committed suicide.

The primary answer to each assumption is that it is false in fact:

Firstly, the States of the United States were, at their inception, and are now, free and voluntary associations for governmental purposes of the very human beings whom the first assumption would make chattels of the State, and were *never*, any of them, absolute monarchies composed of an autocrat and a few nobles ruling a population of serfs.

Secondly, while such a thing as a purported surrender by the people of all their power, originally to a "*dictator*" and later to an emperor, did repeatedly happen in Rome, no such thing has happened in the United States. To the contrary, our ancestors, who were well aware of the seductive qualities of Civil law doctrine in general and of the danger of a reception of the text quoted above in particular, aimed at it, not one, but two Articles of the bill of rights, namely:

> IX. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the *people*."[29]
>
> X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the *people*."

The State constitutions sometimes manage to be still more explicit; *e.g.*, Article I, § 20 of the Constitution of Ohio, at the close of the Ohio bill of rights, provides:

> "§ 20. This enumeration of rights shall not be construed to impair or deny others retained by the *people*; and *all* powers, not herein delegated, remain with the *people*."

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[29] All emphasis inside quotations, wherever it occurs in this brief, has been inserted by counsel for appellant unless the contrary is expressly noted.

The *fact* thus is that the people of the United States *did not* invest their governments, State or national, with arbitrary power over them. Instead, to the extent that clear and unambiguous written constitutions can accomplish such an end, they provided for themselves "a government of laws, and not of men."

And although the foregoing answer to the assumption of the Civil law is complete, it is nevertheless, as the constitutional provisions just quoted make evident, but half the whole answer to that assumption. The rest of the answer is that the people of the thirteen original States *could not*, even had they wanted to try, grant such power to any government of theirs:

Those people were, in the strictest and most technical sense, "free men."[30] *As* free men, they had brought the common law with them when they came here. Each of them was thus necessarily subject to the rule and basic principle of the common law, adhered to rigidly by the common law courts since the 12th century, that a "free man" *does not have the legal capacity*, short of committing a crime, to bargain away or in any wise destroy, either in whole or in any significant part, his free status, even by his own act,[31] much less the capacity to "yield up" such a power

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[30] This is true even though it be supposed that some of the original emigrants to the colonies were escaped villeins. The mere fact of their escape would have disseised their lords of their persons and given them seisin of themselves, rendering them free both technically and in fact. *Holdsworth* (A History of English Law), 5th ed., iii, 494-5.

[31] The principle that a man *cannot*, short of committing a crime, affect his free status, pervades our law. It may be a cognate antipathy toward letting a man bargain away his life that makes the victim's consent no defense to a charge of murder.

The principle itself operates in the rules that govern a man's contract for his personal services. The law lets a man freely bind himself to make reparation in damages for *failing* to do work he has bargained to perform. It even lets him, where the services involved are unique, bind himself *not* to furnish the services to anyone else than the person agreed. The law does *not* grant, however, that he can bind himself actually to *do* the

to anyone else. That the people of the original States were subject to this rule and entitled to its protection, they

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work, for that would be to let him, in some measure, reduce himself to servitude. See *Bailey* v. *Alabama* (1911), 219 U.S. 219, 55 L. ed. 191, 31 S. Ct. 145.

But the basic place of the principle in the common law is most strikingly illustrated by another manifestation of it:

The common law *knew* an unfree status—that of villeinage. That servitude, its true origins then already lost in the mists of antiquity, confronted the common law courts when, in the 1100's, they first began to sit as at present manned by professional judges. The existence of that servitude could have made it easy for the common-law judges to hold that free men *could* bargain away their freedom. Indeed, the Civil law texts, with which they were thoroughly familiar, must have nudged them toward such a course.

From the start, however, the common law courts' holding was that it was impossible for a man to sell himself into villeinage. Indeed (with one qualification touched on below) they held that *no* way existed for a man to *become* a villein. The holding was that, for a man to *be* a villein, he and each of his ancestors in the male line from the beginning of human memory must affirmatively be *proved* to have been villeins—that any villeinage that had commenced *within* memory was a nullity.

Examples are the defenses of bastardy and *advenlif*. If, *within* memory, a male ancestor of a defendant had been a bastard, or had come into the county from elsewhere, then the charge that the defendant was a villein collapsed. See authorities collected in Hargrave's famous argument in *Sommersett's Case* (1771-2), 20 State Trials 1, pages 46-7. (Also reported as *Sommersett* v. *Stewart*, Lofft 1, 98 Eng. Repr. 488.)

And, until and unless a lord produced in open court two male witnesses of the same blood in the male line as the defendant, who could and did swear of their own knowledge that the defendant, they themselves, and all his and their ancestors in the male line for *five generations* removed from the defendant, had been villeins of the plaintiff or of those from whom the plaintiff derived his title, the defendant did not even have to *plead* to the charge of villeinage. *Holdsworth*, 5th ed., iii, 498, and 499, note 4. 20 State Trials, 45. If the lord failed to produce his witnesses within rule, the judgment of the court was that the defendant should be "free forever," and the lord was amerced for his false claim. *Ibid.*

Appropriately, the qualification mentioned in parentheses above concerned these witnesses who confessed themselves to be villeins for the purpose of fastening villeinage on someone else. A statement of the qualification, somewhat exaggerated, appears in Y.B. 19 Henry VI, the Year Book for 1441. Lord Mansfield calls it "the last confession of villeinage extant" (20 State Trials, 78). It is here translated from *Holdsworth* (5th ed.), iii, 493, note 1):

"[Mr. Justice] *Newton* said to the witnesses, 'How near are you in blood to the defendant?' They answered that they were his

themselves solemnly asserted and proclaimed in the *Declaration of Independence*.[32]

Being destitute of legal power to alienate the rights that, according to the principles of the common law, are inherent in free status, the people of the early United States were expressing a simple truism when, in the constitutions quoted above, they recited that, whether enumerated in said constitutions or not, those rights are "*retained by the people*." It would still have been so if it had not been said.

The holding of the courts below is that the bare domicil and consequent citizenship in Wisconsin of a citizen of the United States, give Wisconsin power, without notice to him, to adjudicate him to be a minor or lunatic and commit him to custody.[33] Such a power in a State, obviously, is in fact a privilege for it to commit its citizens to custody at its

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uncles. *Newton*—'Are you villeins to the plaintiff also?' They said 'Yes.' Then said *Newton*, 'Even though you were free before this day, by this confession before us, you have bound yourselves and the heirs of your bodies to villeinage forever.'"

The bit about the witnesses having bound "the heirs of their bodies" to villeinage was an eruption of indignation at the witnesses, not a statement of the law. No case exists where a charge of villeinage was ever founded on a confession of villeinage made by a defendant's *ancestor* (see 20 State Trials, 57, at note f), and it was settled that, if it appeared that any one of a man's ancestors in the male line had been free, the charge of villeinage collapsed. See above; and see *Holdsworth*, above, 498, note 3. A man who thus confessed himself to be a villein under oath did, however, estop *himself* to deny the truth of his confession (20 State Trials, 57), thus subjecting himself, if he had sworn falsely, to a poetically fitting penalty for his particular perjury.

In short, from the time from which we first know anything of our law, and probably from a time long before, it has been settled law that a free man *cannot* bargain away his free status or any right inherent in it,—that he cannot even *impair* his free status save by committing a crime.

[32] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable* Rights, that among these are Life, *Liberty* . . ."

[33] See page 28 above, note 28.

whim. It is obvious, further, that the status of a person who has become the subject of such a power is not that of "free man."

However, according to rules of the common law we sincerely hope the "due process" clauses of the 5th and 14th Amendments have made immutable, the free status of the original people of the United States was an "inheritance" and, as such, has by a continuous chain of descents, passed to and vested in their heirs, the people of today.[34] The status of the people of the United States having thus been uninterruptedly free, there has never been a moment when they have had the slightest legal capacity to abridge, nor to empower any State of which they were citizens to abridge, their original status as "free men." Consequently, it is a legal impossibility for Wisconsin, or any State of the United States, to possess the power the courts below attribute to Wisconsin.

It follows that a State that purports to exercise such a power over its citizens is, of necessity, guilty of nakedly usurping a power it *cannot* possess, and consequently of depriving its citizens, in open defiance of § 1 of the 14th Amendment, of their liberty without due process of law. It further follows that any other State that gives legal effect to such usurpation is equally guilty of violating the 14th Amendment.[35] Each has breached the pledge of *Magna Charta*, imposed on each by the 14th Amendment, that (Chap. 39):

> "No *free* man shall be taken, or imprisoned, or be disseised of *his* freehold, or *liberties*, or *free* customs, or be outlawed, or exiled, or any otherwise destroyed —nor will we *pass upon* him, nor will we send upon him—but by the lawful judgment of his peers, or by *the law of the land*."

[34] *Holdsworth*, 5th ed., iii, 502.

[35] *Griffin v. Griffin*, (1916), 327 U.S. 220, 228-9, 90 L. ed. 635, 66 S. Ct. 556, 560.

A Subsidiary Assumption

An assumption subsidiary to the assumption last discussed would be that, at some time in the past, the people of Wisconsin had purported to convey to that State legal title to all children any of them might have in the future, with the intent that each Wisconsin child, the instant he is born, or the instant he otherwise becomes a domiciled citizen of that State, should automatically vest in and become a ward of the State.

From such an assumption it would follow, just as from the *first* assumption discussed above, that the State of Wisconsin has, with respect to all Wisconsin children, a legal right to their possession which, by an appropriate instrument that would be entitled to enforcement wherever it might be produced, Wisconsin can vest in whom it sees fit. It would follow, that is, if we could admit what the Civil law would at once admit, namely, that such a conveyance could be valid.

We doubt that the people of Wisconsin have ever purported to make such an advance conveyance to that State of all the children they may ever have. We will assume in support of the Wisconsin decree, however, that it is so.

But, as will appear below, this Court has already made it plain that "the right of the individual * * * to marry, establish a home *and bring up children*" is a right inherent in free status. Such being the case, what has already been said establishes that the people of Wisconsin were totally destitute of legal capacity to bargain away their unborn children and that any effort of theirs to do it was devoid of legal effect.

At the end of the last century, the Supreme Court of Nebraska was compelled to deal with such a contention in *Norval v. Zinsmaster* (1898), 57 Neb. 158, 77 N.W. 373, 73 Am. St. Rep. 500, a case where a trial court had seen fit to

take two children from their mother, who was quite able to support them modestly, and give them to their paternal grandfather on the ground that he could support them better. The court said (57 Neb., 161-2):

> "We are aware that this court has several times asserted that, in such controversies as the present, the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide. The statute declares, and nature demands, that the right shall be in the parent, unless the parent be *affirmatively* unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents —so long as the latter discharge their duties to the best of their ability—and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed—by revolution if necessary."

The State Decisions

The order of argument adopted here may seem peculiar. The cases squarely in point on the jurisdictional fact situation before the Court in this case—and there are not only many such, but they support us—have not yet been discussed.

The explanation is that the cases give no real *reasons* for what they hold. They say, sometimes to an accompaniment of many citations, and sometimes almost none, sometimes at great length and in a variety of ways, and sometimes almost in a sentence, that no such jurisdiction exists as the courts below have asserted on behalf of Wisconsin. But, except for citing textwriters or other cases that merely say the same thing, they do not tell *why*.[36]

[36] The fact that, seemingly without being able to tell why, the cases nevertheless all reach the same result, is a rather striking indication that

In the courts below, we relied primarily on copious citations to the cases and gave second place to the reasons we thought them right. It is because of what happened to us there that we have given first place here to the reasons why we believe the law *must* be what the cases hold it *is*.

Turning to the cases, the answer the courts below have given the question we are now considering is contrary to the virtually unanimous answer heretofore given the question by State courts of last resort. Typical cases are *De La Montanya* v. *De La Montanya* (1896), 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, 53 Am. St. Rep. 165 (child custody).[37] *Grinbaum* v. *Superior Court* (1923), 192 Cal. 566, 221 P. 651 (alleged adult incompetent), and see a companion case, 221 P. 635. *Payton* v. *Payton* (1924), 29 N.M. 618, 225 P. 576, and *May* v. *May* (1931), 233 N.Y. App. Div. 519, 253 N.Y.S. 606 (child custody).[38]

Although we have by now examined several hundred

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perhaps judges, like other lawyers, have a good many times the knowledge and grasp of the principles of justice at their subconscious command that they are able at any one moment to dredge to the surface and consciously express—which is without doubt the reason for the rule that a case is binding authority, not for what it says, but for what it holds on its facts. Yet, what has happened below in this case shows that, even so, it is important that basic principles be spelled out; that the position of even the soundest and most elementary rule is precarious until some court does expose the principles on which the rule rests and pegs it securely to them.

[37] This Court has cited *De La Montanya* v. *De La Montanya* with approval in connection with jurisdictional problems, *e. g.*, in *McDonald* v. *Mabee* (1917), 243 U.S. 90, 61 L. ed. 608, 37 S. Ct. 343. A long dissent in *De La Montanya* v. *De La Montanya* was founded on the fact that the husband, who had fled with the children to Paris, remained domiciled in and a citizen of California and, according to the dissent, had been served in Paris with summons in the California case. *Cf.* cases discussed in notes 19 and 24, pages 19 and 23-4, above.

[38] In order to avoid drowning the Court in citations, we have limited our citations on each point to the four or five cases that seem to us most worth examining. A reference to the cases cited will provide numerous additional citations however.

cases,[39] we have found not a single case where "full faith and credit" has ever been given an award of the custody or guardianship of a minor or incompetent *unless* the court making the award had either (a) physical possession of the minor or incompetent, or (b) jurisdiction of his person, or else (c) jurisdiction of the person of the parent or other individual or institution who was in possession of the minor or incompetent. (Class c of course includes the almost innumerable cases where the court had both parents before it and the child was in the possession of one of them.)

Typical cases where "full faith and credit" has been *denied* for lack of all or part of these jurisdictional requisites are: *Kline* v. *Kline* (1881), 57 Iowa 386, 10 N.W. 825, 42 Am. Rep. 47. *Duryea* v. *Duryea* (1928), 46 Idaho 512, 269 P. 987. *Steele* v. *Steele* (1928), 152 Miss. 365, 118 So. 721. *Ex parte Erving* (1931), 109 N.J. Eq. 294, 157 A. 161. *Gillman* v. *Morgan* (1947), 158 Fla. 605, 29 S. 2d 372. And see *Black* v. *Black* (1924), 110 Ohio St. 392, 144 N.E. 268.[40]

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[39] In the course of preparing this appeal, we have examined between 400 and 500 cases on this general subject. The cases on the subject are so numerous, however, that we do not at all claim to have exhausted them. We know we have not.

[40] We are still unable to see why the Ohio courts thought this case was not ruled by *Black* v. *Black*, in which the facts and holding were as follows:

Early in 1919, a wife left her husband in Massachusetts and removed with their child to Ohio. A year later, on June 3, 1920, the husband filed in Massachusetts an application for custody of the child. On June 24, 1920, after service had been had on the wife in Ohio, the Massachusetts court purported to award the child's custody to the husband. Five days later, on June 29, 1920, the wife filed in Ohio an action for divorce and custody of the child. The husband answered, (a) claiming "full faith and credit" for the purported Massachusetts award of the child to him, and, apparently, (b) attacking the wife's power to change her own domicil. Each defense was overruled in all courts and the wife awarded both custody of the child and a divorce, the Supreme Court of Ohio stating that it "might well" have dismissed on the ground that "no debatable constitutional question was involved".

Appellee Anderson says *Black* v. *Black* is distinguished by the fact that,

Moreover, what should be true in constitutional principle, namely, that regardless of who else is bound by proceedings to which the child or incompetent is not a party, he is never *himself* bound by an award of his custody unless the court has obtained jurisdiction of *his* person, appears to be settled law, with *no* cases contra. *In re Bort* (1881), 25 Kan. 308, 310 (Opinion by the late Mr. Justice Brewer). *Avery* v. *Avery* (1885), 33 Kan. 6, 5 P. 418, 422. *People ex rel. Allen* v. *Allen* (1886), 40 Hun. 611, 620-1. *Grinbaum* v. *Superior Court* (1923), above. And see *Re Alderman* (1911), 157 N.C. 507, 73 S.E. 126, 129, 39 L.R.A. n.s. 988, 992-3, and *Wear* v. *Wear* (1930), 130 Kan. 205, 285 P. 606, 616, 72 A.L.R. 425, 440-1.

No respectable authority supports the holding of the courts below. Among the hundreds of cases we have looked at, only two even say anything that supports it:

The later of the two is *Beckmann* v. *Beckmann* (1948), —— Mo. App. ——, 211 S.W. 2d 536, which is not a decision of a court of last resort. It is decided on the sole authority of the first of the two cases, *Minick* v. *Minick* (1933), 111 Fla. 469, 149 S. 483. The other cases that *Beckmann* v. *Beckmann* relies on are all cases where the court had jurisdiction of the person of the individual in possession of the child. Indeed, even in *Beckmann* v. *Beckmann*, although the parent in possession of the child appeared specially, he nevertheless appeared in the case throughout. And, as he was a domiciled citizen of Missouri, and as the service employed

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in the midst of the divorce case, the wife had the Juvenile Court in the county where the divorce case was pending make the child a ward of that court and commit him to her custody. However, the casual allusion to this in the report, 110 Ohio St., 394, strongly suggests that the proceeding in the Juvenile Court had been strictly *ex parte* and was no bar whatever to the husband's plea of the purported Massachusetts award for what the latter was worth. *Black v. Black* was brought to this Court on error, October Term, 1924, No. 534, writ of error dismissed (1925), 267 U.S. 571, 69 L. ed. 793, 45 S. Ct. 228, and the record in the case is therefore probably in this Court's files.

was in fact successful in giving him notice and bringing him into court, we are at a loss to understand why the Missouri court did not have jurisdiction of his person.[41]

Minick v. *Minick*, the first case, asserts that the bare domicil of a child in Florida, without more, gives the Florida courts jurisdiction to award his custody. But the only authority the Florida court cites is against any such proposition, and the court admits that, without the child, or jurisdiction of the persons of both his parents, its award would be entitled to *no* "faith and credit" outside Florida. On top of this, the court's assertion of such a jurisdiction is sheer dictum. As the court holds at the outset, the appellant waived and cured the original lack of jurisdiction of her person by appearing generally and not specially in the trial court to perfect her appeal. And, although, as we have seen, Missouri later picked the dictum up, it did not last long in Florida. It was tacitly overruled in *State ex rel. Rasco* v. *Rasco* (1939), 139 Fla. 349, 190 S. 510 (where the shoe was on the other foot and Florida held that New Jersey, being without the child, was without jurisdiction), and in *Giachetti* v. *Giachetti* (1946), 157 Fla. 259, 25 S. 2d 658.

In short, briefly to sum up the known decided cases, the holding of the courts below in this case is opposed by the holding in every known case that is in point on its facts, and it is supported by nothing in the cases save a dictum which the court that originated it has long since silently overruled.

The Textwriters

The position of the textwriters on this question is at once as consistent, and as barren of any genuine explanation of the views they entertain, as the cases. Three quotations

[41] *Blackmer* v. *United States* and *Milliken* v. *Meyer*, which see, have been previously cited and discussed in notes 19 and 24, pages 19 and 23-4, above.

will be given, one from before *Pennoyer* v. *Neff*, one intermediate, and one current.

The eminent constitutional authority, the late Chief Justice Cooley of Michigan, in his *Constitutional Limitations* (from which this Court quotes with approval in *Pennoyer* v. *Neff*), says (6th ed., 499):

> "The publication which is permitted by the statute is sufficient to justify a decree in these [divorce] cases changing the status of the complaining party, and thereby terminating the marriage; and it *might* be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, *if* they were then *within* its jurisdiction. But a decree on this subject would only be absolutely binding upon the parties while the children *remained* within the jurisdiction; if they acquire a domicil in another state or country, the judicial tribunals of that state or country would have authority to determine the question of their guardianship there. * * *. The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incidental benefits springing therefrom, and to an order for the custody of the children, *if within the state.*"

In 1901, during a fleetingly revived vogue of the fast waning conception of a unitary marriage and domicil, a slight (but very slight) wavering on the point is encountered in Minor, *Conflict of Laws*, page 208:

> "Primarily and theoretically the courts of the father's domicil alone should have the power to decree the custody of the children to the mother so as to give the decree any extraterritorial effect; for they alone have complete jurisdiction of the entire *res*—of the status of the father and children by reason of the domicil, and of the status of the mother (whether resident or not) by reason of the fact that her status as wife and mother is inseparable from that of her husband and

children. *Practically*, however, the control of the courts of the husband's domicil is complete and perfect only when the *actual* as well as the *legal* situs of the infant children is within its territory. If the children are actually elsewhere, *the court can exercise no real control over their custody*, and it may even be doubted whether any extraterritorial effect should be accorded such a decree."

Currently, in 27 *Corpus Juris Secundum* 1163, Title *Divorce*, §303, a work that ambitiously claims to assimilate and express the effect of *all* the decided cases (and occasionally approaches its aim), the blackface heading to part "b" of said section makes this flat statement:

> "The court cannot award custody where it has no jurisdiction of the person of defendant and the child is not within the state. * * *"[42]

Although the jurisdictional test the textwriters have laid down—namely, whether the child is inside or outside the State—totally excludes any possibility of jurisdiction in Wisconsin in this case and thus fully protects our client, Mrs. May, we are bound to say, in defense of what we conceive to be sound law, (a) that the test is not the one required by *Pennoyer* v. *Neff*, and (b) that it does not explain the cases. We have encountered not a single case that gives the slightest countenance to the proposition that a child's mere presence in the State, out of the plaintiff's possession and in the possession of a person or persons adverse to the plaintiff, would, in and of itself, with no service of process on either those persons or the child, give

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[42] The rest of the blackface heading quoted above from *Corpus Juris Secundum* reads as follows:

> "The authorities are not in accord as to the power of the court where it has jurisdiction of defendant but the child is domiciled outside the state. If the court has jurisdiction of the parties, it may decree maintenance although the child is outside the state."

the court jurisdiction to bind anyone's rights respecting the child.[43]

Speaking now only of the cases which hold that facts *can* exist that will enable a court that has jurisdiction neither of the defendant's person nor the child's person, nevertheless to bind the *defendant's* rights respecting the child (there are cases that *deny* this, and, as already stated, there are *no* cases holding that a court can bind the alleged child or incompetent *himself* unless it has jurisdiction of *his* person), such cases can be reconciled on the basis of one proposition only—to wit, that the absent parent's rights respecting the child are bound if, but only if, the child is in the *possession* of the parent before the court and is thus within the court's *actual* control during the process of adjudication. The rule thus empirically pricked out by the cases is, of course, strikingly similar to the rule of *Pennoyer* v. *Neff*.

RESTATEMENT OF CONFLICTS

Both the holding below and the aberrant views expressed in the *Minick* and *Beckmann* cases are almost certainly to be traced to, among other things, a misapprehension and misapplication of the authorities holding that the domicil of a child or incompetent in one State *restricts* the jurisdiction of *other* States to interfere with this custody—a quite different matter. E.g., *Lanning* v. *Gregory* (1907), 100 Tex. 587, 99 S. W. 542. *Cohen* v. *Judge* (1920), 13 Ohio App. 449, 451. *Durgea* v. *Durgea* (1928), above. 19 *Corpus Juris* 367, §831.

The rule that the domicil of a child or incompetent in one State *restricts* the jurisdiction of *other* States to interfere with his custody, appears to rest on an idea that a State

[43] Quite possibly, under such circumstances, the court is without power to affect even the *plaintiff's* rights. See *Payton* v. *Payton* (1924), 29 N. M. 618, 225 P. 576.

has a peculiarly strong and intimate interest in its infants and unfortunates and that, in consequence, other States, as a matter of international law, owe it a duty not to interfere with their custody beyond the extent required for the immediate protection of the minor or other incompetent. The *Restatement of Conflicts* adopts this rule. For the convenience of the Court, we have here collected the sections of the *Restatement* in which the rule is stated, and also the *Restatement's* "Illustrations" of those sections. The sections are as follows:

"§ 117. GUARDIANSHIP OF THE PERSON. A state can exercise through its courts jurisdiction to determine the custody of children or to create the status of guardian of the person, *only* if the *domicil* of the person placed under custody or guardianship is within the state."

"§ 118. TEMPORARY GUARDIANSHIP. A state can exercise through its courts jurisdiction to protect from harm a person found within its territory by appointing a temporary guardian of such person."

"§ 145. CHANGE OF CUSTODY BETWEEN PARENTS. The state of domicil of the child can change the custody of the child from one parent to the other or to or from both."

"§ 146. CUSTODY ON LEGAL SEPARATION OF PARENTS. Upon the legal separation of the parents, by divorce or otherwise, custody of their child can be given to either parent by a court of the state of domicil of the child."

"§ 148. CHANGE OF CUSTODY BY FOREIGN STATE. In any state into which the child comes, upon proof that the custodian of the child is unfit to have control of the child, the child may be taken from him and given while in the state to another person."

"§ 149. LAW GOVERNING GUARDIANSHIP. The status of guardian and ward is created and terminated by the state of the domicil of the ward."

"§ 150. TEMPORARY GUARDIAN. A temporary guardian can be appointed in any state in which a defective person or a child is found."

In quoting the "Illustrations," we have substituted the letters H and W to indicate husband and wife for the letters A and B, which we found confusing. The five "Illustrations" that follow are all the "Illustrations" given:

"A child domiciled in state X is found wandering without care in state Y. A court in Y may appoint an institution for homeless children to take care of the child until his parent or guardian claims him."

"H and W, husband and wife, have a child C. H and W separate, H being domiciled in state X and W in state Y. The child lives with W and is domiciled in Y. H secures a divorce in X. A proper court in Y may award custody of the child to either H or W."

"H and W, husband and wife, have a child C. H and W separate, H being domiciled in state X and W in state Y. The child lives with W and is domiciled and physically present in Y. H secures a divorce in X. The court may *not* award custody of the child either to H or to W."

"H and W, husband and wife, domiciled in state X, have a child C. A suit for separation is brought by W against H in X. The court awards the custody of the child to W. H seizes the child and carries it to state Y. W brings a proceeding in Y to recover the custody of C. The court will award the custody to W."

"H and W, husband and wife domiciled in state X, have a child C. A suit for separation is brought by W against H in X. The court awards the custody of the child to W. W changes her domicil to Y and takes the child with her. H petitions a court in Y to award to him the custody of the child on the grounds that W is leading in Y a dissolute and immoral life. Such an award is made. W then seizes the child and carries it to state Z. H brings a proceeding in Z to recover

the custody of C. The court will award the custody to H."

Two things are apparent from the foregoing quotations from the *Restatement:*

First, the *Restatement* adheres firmly to the rule that the domicil of a child or other incompetent in one State *restricts* the jurisdiction of other States to interfere in matters pertaining to his custody to such action as is necessary for his immediate protection. While this rule has apparently never been accepted in some States, see *Finlay* v. *Finlay* (1925), 240 N. Y. 429, 148 N.E. 624, 40 A.L.R. 937, and while *Lanning* v. *Gregory*, perhaps the leading case in support of the rule, has been overruled by the court that decided it, see *Wicks* v. *Cox*, (1948), 146 Tex. 489, 208 S.W. 2d 876, 4 A.L.R. 2d 1, it would be wrong to take space to analyze the rule critically here. The rule is here important solely for the light it throws on the probable origin of the ideas that led to the holding below.

Second, that rule embodies the *whole* of the *Restatement's* position. The language of §§ 145 and 146 might, if read alone, give an impression that those sections were saying that the bare domicil of a child in a State, in and of itself, gives all the courts of that State jurisdiction to commit the child to custody. However, when all the pertinent portions of the *Restatement*, including the "Illustrations," are collected and examined together, it becomes apparent that such is *not* the *Restatement's* position—that the reference throughout the sections quoted is to a State's "capacity to *acquire* jurisdiction," which is one of the standard meanings of the word "jurisdiction" and is one of the two meanings in which the expression, "jurisdiction of the subject matter," is used. The *Restatement's* position is simply, as indicated in the previous paragraph, that the State of a child's or other incompetent's domicil *does*

and that other States do *not*, have the *capacity to acquire jurisdiction* to commit him to custody or guardianship.

Frequency With Which Question Arises

The question whether the bare domicil and consequent citizenship in a State of an alleged minor or incompetent, without more, give the courts of that State jurisdiction to adjudicate him to be such and make an order purporting to commit him to custody, is one that recurs constantly in the practice of any lawyer whose practice is at all general. We have never before had it on an appellate level. That, however, is because heretofore, in cases in which either of us has been involved, the court of first instance has held the opposite of what the trial court held here and the correctness of its holding was not questioned. Even more often, of course, the question has not arisen in the court room at all because the lawyer whose client's child was outside the State in the custody of the other parent has thought he knew better than even to ask for custody.

The frequency with which the question arises is pertinent to the merits. Coupled with the unanimity of the reported decisions of the question, it indicates that, to those *reported* cases, there must be added hundreds of unreported cases throughout the United States each year that have been following a settled course of decision which is the precise opposite of the decision the courts below have rendered in this case.

Perhaps it is wrong not to say something in detail about the consistent injustice to which the rule the courts below have propounded would necessarily lead were it to supplant the rule heretofore received as settled law.

The vice of a rule that a man may, without notice, be adjudicated a lunatic and committed to custody merely because he is "domiciled" inside a court's jurisdiction is, however, evident without comment.

The same thing can be said of a holding that the bare domicil of a citizen inside a court's jurisdiction gives it power, without notice and without jurisdiction of his person, to adjudicate him to be a minor and commit him to custody—although, in the case of an alleged minor, a deposit of any such jurisdiction at his "domicil" takes on an added touch of horror from the still imperfect rules for ascertaining a child's "domicil", which, as has been said, are quite capable of putting it "somewhere the child never has been, is not now, and probably never will be."

Second Question, Conclusion

In retrospect, the menace that Civil law conceptions presented during the 1100's to the principles of liberty that were the inheritance of 12th century Englishmen and Normans alike from a primitive past when the common ancestors of both had inhabited the forests of Scandinavia and north central Europe, is very vivid to us. The menace then is vivid now because today we know that these principles, which were at that moment the possession of all Europe, even much of Italy and Spain, into which they had been carried by the Gothic conquests of preceding centuries, were shortly to perish on the continent of Europe in a reconquest of that continent, not by Roman troops, but by Roman law—a reconquest in which the enemy's legions were the *lawyers* of Europe who, if they thought at all, thought the destruction of the people's liberty a trifling price to pay for replacing the uncodified, and to them uncouth, law of freedom, with the ordered elegance and symmetry into which the Civil law has organized the principles of absolutism and slavery.

This part of this case is a demonstration, doubtless only one of the demonstrations that will take place this term, that the conceptions of the Civil law are as living a menace to the basic principles of liberty today as they were in the 12th

century—that no victory over them is ever final, not the victory of the common law judges in the 12th century, not the victory at Runnymede in the 13th of what we can already call the *common law's* principles of liberty, nor their victory over Richard II at the end of the 14th century, or over Charles I and James II in the 17th, nor their victory over parliament, when it purported to mantle itself in the absolute powers earlier claimed by the crown, in the American Revolution, not even their crushing victory in the Constitution of the United States and the first ten amendments—but that the conceptions of the Civil law return perpetually to the attack, and that each victory, if its fruits are not to be lost, must be won again and then again.

It is easy to forget how exposed the whole of our law is to the influence of those conceptions. In conflict of laws, in public international law, in the law of admiralty and prize, in the segments of the canon law applied daily throughout the United States in divorce cases and probate matters, we are forced to administer in our own courts either chunks of the Civil law itself, or systems of law so impregnated with borrowings from the Civil law, and with its attitude that the people are and ought to be at the mercy of a supreme and arbitrary "sovereign power"[43a] lodged somewhere, that they are an equal peril.

The exposed position this case has occupied on the battle-front between the two legal worlds is apparent. The juris-

[43a] The exotic sound such expressions had for common lawyers even as recently as the 17th century is illustrated by the proceedings on the *Petition of Right* presented by Charles I's third parliament in 1628. In an amendment flavored with language of the Civilians whom the Stuarts so often consulted, the lords proposed to say that the Petition was presented "with due regard to leave entire that sovereign power wherewith your Majesty is trusted with the protection, safety and happiness of your people." It was, we are told, with "many expressions of wonder and doubt about 'sovereign power'", that the house of commons acted in rejecting the amendment. *Adams*, Constitutional History of England, ed. of 1927 (Holt), 296.

diction here involved, namely, the jurisdiction to adjudicate alleged minors and incompetents to be such and commit them to custody, involves the liberty of the citizen and is the exclusive property of the common law and chancery. It was being exercised in Wisconsin by a perfectly competent court of general common law and chancery jurisdiction. It was being exercised, however, in *connection* with a *divorce* case. The Wisconsin decree was taken to Ohio, which made it a *conflict of laws* problem. Finally, by merest chance, this habeas corpus action to enforce it happened to be brought in a *probate* court. Thus, at each step, Civil law attitudes and influences prepared the ground for the Civil law conception that men are not masters, but serfs, of the State—whom the State may quite literally reach out to seize where it will, as in this case—to strike once again.

Perhaps this is a very minor battle in the long war between the principles of slavery implicit in the Civil law and the common law's principles of liberty. But the issue is in sharp focus. And the lesson of history is that each such battle is important—that, although the *victories* of liberty are *not* final, the losses are apt to be irretrievable.

THIRD QUESTION

Turning to the third question here, it is plain enough that the courts below hold it to be unobjectionable for a *father* to move his children's home from one State to another without their mother's consent, but vicious in the extreme for a *mother* to do so without the father's consent.

It is not clear, however, whether the courts below hold that § 7996[1] operates *directly* to deprive a wife of the power to change her children's domicil, or whether it does so

[1] § 7996. "The husband is the head of the family. He may choose any reasonable place or mode of living and the *wife* must conform thereto."

indirectly by depriving her of the power to change her *own* domicil.[44a]

The reason for the doubt is that, as mentioned at the outset, *Ohio General Code* §§ 8032 [45] and 10507-8 [45a] (114 Ohio Laws 385) categorically provide, and *In re Corey* (1945), 145 Ohio St. 413, 61 N. E. 2d 892, flatly holds, that a wife's legal powers and rights with respect to her children are, in all particulars, specifically including "custody", *equal* in Ohio to her husband's. How, then, if she has power to change her own domicil, can she lack power to change her children's? [46]

[44a] For the meaning we attach to the word "domicil" throughout this brief, see above, pages 18 to 20.

[45] "§ 8032. When husband and wife are living separate and apart from each other, or are divorced, and the question as to the care, custody and control of the offspring of their marriage is brought before a court of competent jurisdiction in this state, they shall stand upon an *equality* as to the care, custody and control of such offspring, so far as it relates to their being *either father or mother* thereof." (Now § 8005-3, eff. Aug. 28, 1951. 124 Ohio Laws 195.)

[45a] "§10507-8. The wife and husband are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education and the care and management of their estates. The wife and husband *shall* have *equal powers*, rights and duties, and *neither* parent has any right *paramount* to the right of the other *concerning the custody* of the minor or the control of the services or the earnings of such minor *or any other matter* affecting the minor; * * * *Neither* parent shall *forcibly* take a child from the guardianship of the parent legally entitled to its custody.

"In case the wife and husband live apart, the court may award the guardianship of a minor to either parent, and *the state where the parent having the lawful custody of the minor resides, shall have jurisdiction to determine questions concerning the minor's guardianship.*" (114 Ohio Laws 385.)

[46] See *Restatement of Conflicts*, § 32:

"§ 32. SEPARATION OF PARENTS. The minor child's domicil in the case of divorce or judicial separation of its parents, is that of the parent to whose custody it has been legally given. If there has been no legal fixing of custody, its domicil is that of the parent with whom it lives, but if it lives with neither, it retains the father's domicil."

Also see the latter part of the *"Comment"*:

"By statute in several states the father and mother are constituted 'joint

Yet it seems impossible that the courts below have held that a married woman is without power to change her own domicil. Ohio has for two-thirds of a century held that a married woman *can* have a domicil of her own. *Thompson* v. *Love* (1884), 42 Ohio St. 61, 80. *Van Fossen* v. *State* (1881), 37 Ohio St. 317, 320, 41 Am. Rep. 507. *Cox* v. *Cox* (1869), 19 Ohio St. 502, 2 Am. Rep. 415.[47]

This uncertainty as to the exact holding of the courts below has been allowed for in stating the third question:

> 3. When so construed as to take from a wife who is a citizen the liberty and power to change her own or her children's domicil and consequent State citizenship from another State *into* Ohio, is Ohio General Code § 7996 repugnant to § 1 of the 14th Amendment to the Federal Constitution?

Regardless of which construction is attributed to the courts below, we urge that construction violates, in several ways, § 1 of the 14th Amendment:

> "§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they *reside*. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

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guardians of their minor children and are equally entitled to their custody. Where that is the case, if the father and mother have separate domicils, a minor child takes the domicil of the parent with whom it lives in fact."

[47] And see *Restatement of Conflicts*, § 28, as now amended (1948 Supplement):

"§ 28. DOMICILE OF WIFE LIVING APART FROM HUSBAND. If a wife lives apart from her husband, she can have a separate domicil."

The *"Comment"* states:

"With the change in the status of the married woman, so that few, if any, of her common law disabilities remain, the determination of her domicil is based upon the same tests employed to determine the domicil of any person who may act for himself."

person of life, *liberty*, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The first sentence of the 14th Amendment declares the existence of an unqualified right and privilege in every citizen of the United States, for any reason he deems satisfactory, or for no reason at all, to transfer his citizenship and allegiance from one State of the United States to another by the simple process of moving his home from the first State to the second.[48] The fact that the immediate occasion for the declaration of this privilege was the protection of newly created citizens with black skins, in no way implies that the privilege was to be theirs alone. The intention of the 14th Amendment, which could not be more clear or explicit, was to make not only them, but *all* citizens of the United States, *equal* citizens with *equal* rights before the law,[49] and to have *no* citizen of the United States who is legally a citizen merely of a second, third or fourth class.[50]

Immediately after the adoption of the 14th Amendment, the Supreme Court of the United States said, in *Cheever* v. *Wilson* (1870), 9 Wall. 108, 124, 19 L.ed. 604, 608:

> "It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it

[48] See the *Slaughter House Cases* (1873), 16 Wall. 36, 21 L. ed. 394, 409-10, where the Court said:

> "Another privilege of a citizen of the United States * * * is conferred by the very article [*i.e.*, §1 of the 14th Amendment] under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein * * *."

[49] *Strauder* v. *West Virginia* (1880), 100 U.S. 303, 25 L. ed. 664, paragraphs at end of page 665 and start of page 666.

[50] See *Edwards* v. *California* (1941), 314 U.S. 160, 181, 185, 86 L. ed. 119, 62 S. Ct. 164, 179, 172.

would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so."

Again, in 1913, this Court, in *Williamson* v. *Osenton*, 232 U.S. 619, 625-6, 58 L.ed. 758, 762, 34 S.Ct. 442, said:

> "The only reason that could be offered for not recognizing the fact of the plaintiff's *actual* change [of domicil], if justified, is the now vanishing fiction of identity of person. But if that fiction does not prevail over the fact in the relation for which the fiction was created, there is no reason in the world why it should be given effect in any other. However it may be in England, that in this country a wife in the plaintiff's circumstances may get a different domicil from that of her husband for purposes of divorce is not disputed, and is *not open* to dispute. *Haddock* v. *Haddock*, 201 U.S. 562, 571, 572. This she may do without necessity and simply from choice, as the cases show, and the change that is *good as against her husband* ought to be good against all."

As far as is known, there is no expression by the Supreme Court of the United States that would give any more encouragement than the foregoing to the view that married women may lawfully be excluded from the privilege conferred by the opening sentence of the 14th Amendment. We urge that no such power exists.

That sentence, moreover, deliberately withdraws from the States the entire subject matter of the place of residence and State citizenship of United States citizens and makes it a subject matter of exclusively Federal cognizance.

First Alternative

We urge that, if the Ohio courts have held that §7996 deprived Mrs. May of the privilege of moving *her* home and resulting State citizenship into Ohio, it follows from the

foregoing that Ohio has made and enforced a law that abridges a privilege given by the Constitution of the United States to all citizens of the United States regardless of their color, sex or other previous condition of servitude, and that the General Assembly of Ohio, in presuming thus to legislate on a subject matter that the first sentence of the 14th Amendment has made one of exclusively Federal cognizance, has invaded a field which, to the extent it is open to legislation at all, is reserved solely to Congress.

We urge it further follows that Ohio has taken from Mrs. May a *liberty* granted by the Constitution of the United States to all citizens of the United States without regard to color, sex or other previous condition of servitude. Ohio has done so, as is obvious, for no reason other than that she is a *woman* who has married. We urge that there is nothing about being a female that makes it any less arbitrary or capricious to deny the liberty to establish a separate home to a woman who marries while extending that privilege to a man who marries, than it would be to deny that privilege to a man who marries while extending it to his wife.

We therefore urge that, if §7996 has been so applied, it has, in addition to abridging Mrs. May's privileges as a citizen of the United States, and in addition to being a State invasion of the powers of Congress, deprived her of her liberty without due process of law and denied her the equal protection of the laws.

Second Alternative

If, on the other hand, the holding attributed to the Ohio courts is that §7996 left Mrs. May free to change her own home and citizenship to Ohio, but nevertheless deprived her of the power and liberty to remove her *children's* home and State citizenship into Ohio, we urge it follows that this construction and application of that statute likewise vio-

ders it void as attempted State legislation upon a subject matter that the first sentence of the 14th Amendment has taken from the States and made one of exclusively Federal cognizance. The place of the residence and resulting State citizenship of *children* "born or naturalized in the United States" is as much controlled by the first sentence of the 14th Amendment as is that of adults so born or naturalized—children are equally "persons"—and, whatever the power of legislation on this subject that Congress may possess, the 14th Amendment leaves the States none.

To open a breach in the 14th Amendment's exclusion of the States from this field would, as is evident, be fatal:

If a State may take from a citizen mother the legal power to shift the home and State citizenship of her citizen children into that State, it may likewise take that power from a citizen father. And if a State may lawfully take from parents the power to shift their children's home and State citizenship into the State, no reason is apparent why the State may not also take from them, or from *all* adult citizens, the power to shift their *own* homes and State citizenship into the State, or make it dependent on their first passing a "literacy" test, or paying a poll tax, or on any of the other dodges so familiar to this Court from the election cases, thus defeating in whole or in great part one of the two primary objects of the 14th Amendment's opening sentence.

Moreover, if § 7996 is thus construed, it again follows that Ohio has made and enforced a law that abridges Mrs. May's privileges and immunities as a citizen of the United States. A parent who can exercise the privilege freely to move his home and State allegiance from one State to another only at the cost of leaving his children behind, or if he is permitted to bring them *physically* across the State line, at the cost of having them remain in a state of alienage in the new State, is scarcely in the full enjoyment of the privilege the

first sentence of the 14th Amendment gives him. The privilege *has* been "abridged."

Lastly, if §7996 is thus applied, it still follows that §7996 deprives Mrs. May of her liberty without due process of law and denies her the equal protection of the laws:

In *Meyer* v. *Nebraska* (1923), 262 U. S. 390, 399, 67 L. ed. 1042, 1045, 43 S. Ct. 625, in which the United States Supreme Court overturned a State statute that made it an offense for parents to have their children taught German, the Court said:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff by the 14th Amendment. 'No State . . . shall deprive any person of life, liberty or property without due process of law.'
>
> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual * * * to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men."

In *Pierce* v. *Society of Sisters* (1925), 268 U.S. 510, 69 L.ed. 1070, 1078, 45 S.Ct. 571, the Court said:

> "Under the doctrine of *Meyer* v. *Nebraska* * * *, we think it entirely plain that [an Oregon statute forbidding parents to send their children to private schools] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

A parent's right not to have his children arbitrarily taken from him by the State was perhaps not entirely absent

from the mind of the Court when, in *West Virginia* v. *Barnette* (1943), 319 U.S. 624, 638, 87 L.ed. 1628, 1638, 63 S.Ct. 1178, 1185, the Court said:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights, may not be submitted to a vote; they depend on the outcome of no elections."

And see *Prince* v. *Massachusetts* (1943), 321 U.S. 158, 165-6, 88 L.ed. 645, 652, 64 S.Ct. 438, 442.

Ohio recognizes that the mere fact of being a female does not render a parent of children unfit to possess the power and liberty to establish a home for them and maintain them in it. In Ohio as everywhere, that liberty is freely accorded to *unmarried* mothers. Ohio likewise recognizes that the *marriage* of a parent of children does not unfit him to possess that liberty. As this case illustrates, it accords the liberty freely to *married* fathers. How, then, can a statute be anything but arbitrary and capricious which provides that, by *marrying* the father of her children, a *female* parent forfeits the power and liberty she previously possessed to establish a home for her children and maintain them in it?

Thus, as construed and applied, §7996 deprives Mrs. May of this liberty arbitrarily and capriciously. We therefore urge that it has taken her liberty without due process of law. And since §7996 as construed and applied arbitrarily discriminates against married females in favor of married males in a matter respecting which, if any discrimination could be reasonable, the reasonable discrimination would be the other way, §7996 has denied Mrs. May the equal protection of the laws.

Third Question, Conclusion

Thus, it is true that, regardless of which construction of *Ohio General Code* § 7996 is attributed to the courts below, that construction does achieve the singular feat of causing § 7996 to violate each and every clause of § 1 of the 14th Amendment.

In addition, as is evident without a formal demonstration, the construction of § 7996 last considered takes the *liberty* of the three *children* in this case without due process of law, and causes that statute to abridge, in the case of each child, a privilege or immunity conferred on *him* by the first sentence of the Fourteenth Amendment.

In closing, we are aware that the questions respecting the opening sentence of the 14th Amendment are, except for the passage quoted from the *Slaughter House Cases* in the margin, page 53 above, note 48, questions of first impression. As stated in the Jurisdictional Statement:

"Although some of these questions have been touched on in, among other cases, *Crandall* v. *Nevada* (1868), 6 Wall. 35, 18 L.ed. 745, the *Slaughter House Cases* (1873), 16 Wall. 36, 21 L. ed. 394; and *Edwards* v. *California* (1941) 314 U.S. 160, 86 L.ed. 119, 62 S.Ct. 164, none of them has been settled."

Among the "other" cases, the questions here have received an oblique flick in passing, that is all, in such cases as *Williams* v. *Fears* (1900), 179 U.S. 270, 274, 45 L. ed. 186, 21 S. Ct. 128; *Twining* v. *New Jersey* (1908), 211 U.S. 78, 97, 53 L. ed. 97, 29 S. Ct. 14; and *United States* v. *Wheeler* (1920), 254 U.S. 281, 299, 65 L. ed. 270, 41 S. Ct. 133. However, even without this Court's statement in the *Slaughter House Cases*, the questions would not be *entirely* open.

Crandall v. *Nevada*, above, although it was decided before the 14th Amendment, is most provocative. It laid a tax on getting out of Nevada. Although it fenced people in instead of out, it did in effect put a fence around Nevada just as, according to the courts below, § 7996 puts a fence around Ohio. This Court, despite the fact that the fence had gates through which anyone could get by paying a dollar, held the tax bad on the ground that, quoting from Mr. Justice Grier in the *Passenger Cases* (1849), 7 How. 283, 12 L. ed. 702, "We are all citizens of the United States, and as members of the same community, must have the right to pass and repass through every part of it as freely as in our own States", and that Nevada's tax abridged that right.

In *Edwards* v. *California*, above, California endeavored to erect a fence to keep indigent citizens of the United States out. This Court, without hesitation, again tore the fence down, although the majority placed the result on the Commerce Clause.

And *Truax* v. *Raich* (1915), 239 U.S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A. 1916D, 545, Ann. Cas. 1917 B, 283, specifically held that even an *alien*, once the United States admits him, is admitted "with the privilege of entering and *abiding* in the United States, and hence of entering and *abiding* in any State in the Union." The Court then held, "Being lawfully an *inhabitant* of Arizona, the complainant [Raich] is entitled under the 14th Amendment to the equal protection of its laws." Thus, this Court holds that even an *alien* is privileged, once the United States admits him, to move his home freely from State to State—the very privilege § 7996 as construed by the courts below abridges.

When, to the foregoing authorities, there are added both this Court's flat statement in the *Slaughter House* cases and the unequivocal language of the first sentence of the

14th Amendment itself, there is a sense in which it can be said that the questions here presented concerning that sentence are not open questions at all.

WHEREFORE: For each of the several reasons urged, appellant respectfully asks that the judgment of the Supreme Court of Ohio in this case be reversed.

Respectfully submitted,

RALPH ATKINSON,
F. W. SPRINGER,
Attorneys for Appellant.

APPENDIX

PROBATE COURT

Order of July 5, 1951 (R. 132.)

(Still in force.)

This day this cause came on to be heard and was submitted to the Court upon an agreed statement of facts. And it appearing that the question before this Court is one entirely of law, this cause is continued to July 13, 1951, at 9:30 a.m., pending which time counsel for the petitioner and for the respondent have agreed to file briefs.

It is the order of this Court that pending a final hearing of this case, the minor children concerned, to wit, Ronald Anderson, Sandra Anderson and James Anderson, are to remain with Mrs. Leona Anderson May at her home on the Lisbon-Columbiana road, Route 5, Lisbon, Ohio, there to remain and be within the jurisdiction of this Court at all times until this matter is finally determined, and the said children shall not be removed from Columbiana county.

Pending the final determination of this cause, the petitioner herein, Owen Anderson, shall have the right of visitation with the minor children concerned at any and all reasonable times.

OPINION OF PROBATE COURT

Part of Record (R. 21-31)

July 13, 1951

TOBIN, J.

This cause came on to be heard on the petition of Owen Anderson for Writ of Habeas Corpus, against Leona Anderson May, his former wife, and involved the three minor children of the parties: Ronald Anderson, Sandra Anderson and James Anderson.

In this action an agreed Statement of Facts was submitted to the Court whereby the parties agreed and stipulated as follows:

"That the defendant, Leona Anderson May, is a native of the State of Wisconsin and that the plaintiff and defendant were married in the State of Wisconsin and were residents of and domiciled in that State up to the latter part of the month of December, 1946, at which time the defendant left the State of Wisconsin with the aforesaid children and came to the State of Ohio; that the said children which are the subject of this action in Habeas Corpus, to wit: Ronald Anderson, Sandra Anderson and James Anderson, were born in the State of Wisconsin and at all times resided in that State with their parents, plaintiff and defendant, up until the last part of December, 1946, at which time the defendant brought them into the State of Ohio; that the plaintiff, Owen Anderson, at all times has been, and is now, a resident of and domiciled in Waukesha County in the State of Wisconsin.

"That the said defendant, Leona Anderson May, established a separate domicile in the State of Ohio the latter part of December, 1946, and has ever since that time been domiciled in Lisbon, Columbiana County, Ohio.

"That on February 5, 1947, the plaintiff herein was granted a divorce in the County Court of Waukesha, State of Wisconsin. That at the time said divorce was granted, and at the time the petition for said divorce was filed, as well as at all other times in between, the defendant, Leona Anderson May, was in Lisbon, Columbiana County, Ohio, and had with her at all said times the three minor children aforesaid, Ronald Anderson, Sandra Anderson and James Anderson.

"That the only service made on the defendant in connection with said divorce proceedings, was that made by the Sheriff of Columbiana County, Ohio, in which he personally handed the defendant a copy of the summons from Waukesha County, Wisconsin, and a copy of the divorce petition filed in the County Court of said

Waukesha County, Wisconsin. That the defendant never entered her appearance in the County Court of Waukesha County, State of Wisconsin, and filed no waiver, answer or demurrer therein. That the plaintiff obtained a decree of divorce, which among other things, adjudged and decreed that the care, custody, management and education of the minor children of the parties was awarded to the plaintiff, subject to the right of the defendant to visit said children at any and all reasonable times. That said decree was entered by default in the absence of any appearance by the defendant.

"That thereafter the plaintiff came to Lisbon, Columbiana County, Ohio, and, accompanied by a police officer of the Village of Lisbon, Ohio, demanded and obtained the aforesaid children from the defendant. That the plaintiff has retained custody of said minor children since February of 1947, having taken them back with him to Waukesha County, Wisconsin.

"That no further legal proceedings of record have been had in said divorce case since the aforesaid divorce decree was entered.

"That on July 1, 1951, the plaintiff brought the aforesaid children with him on a visit to Columbiana County, Ohio, and voluntarily permitted the children to go on a visit for a limited period of time to their mother's, the defendant herein. That the mother, the said defendant herein, has refused to surrender said children to the plaintiff, and the plaintiff has filed this action to recover the possession and custody of said children."

In addition to this agreed Statement of Facts, the parties here are unable to agree as to the fact whether or not the children were in the State of Ohio, with the consent of the plaintiff, or father, Owen Anderson. Testimony was taken, both parties testifying, and the Court does find that the children were brought into the State of Ohio by the mother, at the time they actually came into the State of Ohio with the mother, with the knowledge and consent of the father, the understanding of the father being that such visit was temporary, that before anything permanent was

done regarding the marital status of these parties, including the children, the children were to be returned to the State of Wisconsin [1]; and that he did ask for the return of the children prior to January 6, 1947, the date the petition for divorce was filed.

Decision

The agreed statement of facts together with the facts found by the Court raises the following questions:

1. Can the Wisconsin court decree be collaterally attacked in this Ohio court; or under the full faith and credit provision of the United States Constitution, must this Court accept such decree at its face value?

This question has been decided many times by the Courts of Ohio, as well as by the Federal Courts — who have held that while full faith and credit will be given to divorces granted in other states, nevertheless, where the divorce was granted upon service of summons by publication and no personal service was had within the State granting the divorce, the decree is not effective beyond the dissolution of the marriage contract, and as to other matters it may be collaterally attacked as to all other related subjects. *Cox vs. Cox*, 19 O. S. 502; and 14 *O. Jur.* 553. Under these decisions, this Court is permitted to entertain pleadings and evidence relative to this Wisconsin decree to establish whether or not said decree was valid as pertaining to the subject matter at hand, to wit: the custody of these children. In other words, it is the finding of this Court that it legally has the right to question that much of the Wisconsin decree, that deals with the custody of the children which it purports to determine. In passing it might be stated that this entire Habeas Corpus proceeding is based upon the Wisconsin decree of divorce, granting custody and control of said children to the father, or Petitioner, in this case.

The next question to be determined is whether or not the purported personal service upon the defendant, Leona Anderson, now May, through the Sheriff of Columbiana County, Ohio, amounted to personal service in Wisconsin. The Court was unable to obtain, nor could counsel obtain

[1] See page 6 of the brief, supra.

for the Court, the exact statutes on service in the State of Wisconsin. However, in Keezer on *Marriage and Divorce*, Third Edition, at page 1236, the statement is given as follows:

> "Personal service outside of the State is equivalent to publication in the State of Wisconsin."

The Court will accept, therefore, this statement to be the law of the State of Wisconsin, and, therefore, this case will be treated as if service had been made by publication.[32]

This brings us logically to the next question, namely:

2. There being no personal service on the defendant, Leona Anderson May, in the divorce case in Wisconsin, and it being agreed by the parties that the children were not physically present in the State of Wisconsin, either at the time of filing the divorce petition, or at the time of obtaining the divorce, did the Wisconsin Court have the authority to decree the custody of these minor children to the Petitioner herein, their father?

There are in the United States two schools of theory on that point. 14 *Ohio Jurisprudence* 552, § 149, indicates that Ohio follows that theory which states that personal service or presence of the children within the State is necessary to give the Court jurisdiction to decide custody of minor children.[33] However the statement in *Ohio Jurisprudence* is based upon two cases therein cited: *Cohen vs. Judge*, 13 O. Appellate 449; and *Keenan vs. Keenan*, 17 Ohio Dec. N. P. 581. Reading of these cases throws a different light on the subject.

The *Cohen* case had a peculiar set of facts. In that case the children had never been out of the State of Ohio, except on summer vacations. The mother had gone to Illinois and obtained an Illinois divorce after two years' or more, absence from Ohio. Said Illinois court granted to her the

[32] The Wisconsin statutes are quoted in the opinion of the Court of Appeals at pages 16a and 17a.

[33] It will be discovered that the trial court cites no example of any theory other than the theory it states above.

care, custody and control of the child involved, based upon its presence in Illinois during Summer vacation. The Ohio courts held, in the *Cohen* case, that a foreign court in a divorce proceeding on service by publication against a defendant in Ohio, has no jurisdiction or control over the defendant's children, domiciled in Ohio, and an award of custody of the child by such court is of no effect; that such foreign court could not obtain jurisdiction over said children by their being temporarily out of the State, their domicil remaining in Ohio. The court emphasized the fact, that the children were domiciled in Ohio, had always been domiciled in Ohio, and had never been domiciled in the State of Illinois, that their presence during Summer vacations was not enough to give Illinois jurisdiction.[34]

Black v. *Black*, 110 O. S. 392, another case cited, holds as follows: The mother in Ohio, had filed an action in divorce. The father contested the same, particularly that part relating to the custody of the minor child, and introduced a Massachusetts decree, obtained by service by publication in which the matter of divorce and the custody had been settled by the Massachusetts court. The Court refused to recognize the Massachusetts divorce, in so far as it dealt with the custody of the child remanded. One of the questions raised in the *Black* case is whether or not the Court of Common Pleas of Franklin County, Ohio, had jurisdiction at all. The Court first determined that it did have jurisdiction but because the defendant had submitted himself to its jurisdiction. However, the child involved in the case had already been made a ward of the Juvenile Court of Franklin county and placed in the custody of the mother, and the child had been with the mother in Ohio for nearly a year before the divorce decree in Massachusetts had been obtained.[35]

In *Re Paul A. Rioux*, 87 O. S. 72, the child was brought

[34] The trial court is in error in its statement of the facts of *Cohen* v. *Cohen* (1928), 13 Ohio App. 149, 32 Ohio C. C. ns. 457. The children were never in Illinois until after the Illinois decree of divorce. Due to this error respecting the facts, the trial court misreads the holdings in *Cohen* v. *Cohen*.

[35] *Black* v. *Black* (1924), 110 Ohio St. 392, 144 N.E. 268, on all its facts, is more in point than appears from the Probate Court's opinion and is perhaps directly in point. See page 38 of the brief, note 10.

into the State of Ohio by the mother, without the knowledge or consent of the father, the father at all times remaining in Kentucky. An arrest [of the father] for non-support followed. In a Habeas Corpus hearing the Ohio court held, among other things, that the legal domicile of the child remained in Kentucky with the father.[56]

Keenan vs. *Keenan*, 17 O. Dec. N.P. 581 contained these facts: The parties had originally lived in Missouri. The mother took the child, or children, fled from Missouri, came to Ohio and lived here two or three years. The question arose whether or not the foreign decree would affect her rights to the children in Ohio. The Court held that it could not, where there had been no original service. In that case, the divorce was granted on a cross-petition on which there was no personal service made. However, the best interest of the children was taken into consideration in deciding this case.

This brings us to the crux of this case, namely: Can the State of Wisconsin grant the care, custody and control of these children who have been physically absent from the State of Wisconsin for a period of ten days, prior to the filing of the petition, and where the father has consented to such absence only on a temporary basis; and, secondly: Where was the legal domicile of the children? It is the belief of this Court that the legal domicile of the children is very important.

There is no question but that Mrs. Anderson established her domicile in Ohio, the exact time, I do not know, except that it was between December 26, 1946 and January 5, 1947. *When she left Wisconsin, it was undecided whether she was going to stay or come back.*[57] But at the exact time when she informed her husband she was not coming back to him but she was going to stay in Ohio, she lost her Wisconsin domicile and obtained a domicile in Ohio. 14 *O. Jur.* 582;

[56] The opinion of Judge Donahue in *In re Poage* (1912), 87 Ohio St. 72, 100 N.E. 125, contains an extended discussion of *Ohio General Code* § 7996 (see 87 Ohio St., 81-5) and is of importance because the trial court's application and construction of § 7996 is very evidently the outgrowth of the interpretation the trial court put on that discussion. It will be noted that Judge Donahue's discussion overlooks § 8032. Section 10507-8 did not become effective until two decades later, in 1932. See [illegible], p. 51.

[57] Emphasis added by counsel for Mrs. May.

Surgeon v. *Korte*, 34 O.S. 525; *Smerda* v. *Smerda*, 35 Ohio Op. 432, 74 N.E. 2d 751.

Domicile, of course, is different from residence.[58] A person may be domiciled in a state and yet not have residence in that state, for any number of purposes. For the purpose of divorce under our statutes residence in the state for one year is required, or for the purpose of obtaining alimony only thirty days in the state is required.

However, did the mother's change of domicile effect a change of domicile for the children? Secondly, does it matter in so far as the ability of the Wisconsin court to grant the custody of the children; or, stated simply, regardless of the domicile of the children, must they physically be within the State of Wisconsin?[59]

General Code of Ohio, Section 7996, states:

> [§7996.] "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto."

Therefore, the domicile of the children originally was with the father and they were domiciled in Wisconsin. When the mother changed her domicile, did that affect the domicile of the children?

In re Adoption of Francis, 49 O.L.A. 427, held in an adoption proceeding, that where a Nevada divorce had been obtained by the mother, the child being at the time of the divorce in Ohio, and the father being resident in New York, the Nevada decree ordering support by the father and custody of the child to the mother, held to be null and void; and it further holds that where the child was taken from the father's domicile, *without his consent and against his will*, the child was legally domiciled in the State of New York with the father.

Let's examine the facts as we have found them here. It is true that the children were not taken into the State of

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[58] Not "of course", because often, as in the 14th Amendment, "reside" plainly means "domiciled."

[59] The pivot of the trial court's opinion is at this point, and it pivots on the questions the court does *not* ask. Nowhere does the trial court ask itself how, or when, or even *whether*, the Wisconsin court *acquired* jurisdiction to dispose of these children.

Ohio, against the father's will, in the sense that the mother abducted them, or stole away in the dark of the night. The father knew they were coming to Ohio. The facts clearly show that the children were brought into Ohio with the understanding that whichever way the mother made up her mind, relative to a divorce, the children would be brought back to Wisconsin.[60] The Court further finds that the plaintiff, or father, asked for the return of the children, once he had been informed that the mother intended to remain in Ohio, and she refused to return them.

Under these circumstances, the Court finds that the children, while they were taken into the State of Ohio with the knowledge and consent of the plaintiff, for their temporary absence, their return was withheld against his will and without his consent, and that he had never consented to the children permanently leaving Wisconsin. The Court therefore finds that the legal domicile of the children, at the time of the filing of the divorce, and at the time of the decree in February, 1947, was in the State of Wisconsin with the father; and that the change of domicile by the mother was ineffective to change the domicile of the children.[61]

The Court further finds that in as much as the children were legally domiciled in Wisconsin, the Wisconsin court had jurisdiction over the subject matter and could validly award the care, custody and control of the children to the plaintiff in that action,[62] and their physical absence from Wisconsin was not sufficient to deprive that Court of jurisdiction in this case. In the instant case, the children had

[60] See page 14 of brief at note 13.

[61] The trial court bases this holding wholly on §.7996, above. In its special findings of law, it holds (R. 82):

"The plaintiff husband in this case having never consented to change the home or domicile of said children to Ohio, and having never consented to their permanently leaving the State of Wisconsin, and the plaintiff being the *legal head of the family*, and having *established a home in Wisconsin* for said parties and children, the *legal domicile* of the children, on January 6, 1947, and continuing through the time of the divorce decree, was still in Waukesha county, Wisconsin, within the territorial jurisdiction of the County Court."

[62] The bare domicil of the children in Wisconsin is here held to have given the Wisconsin court jurisdiction to award their custody. Nowhere does the opinion cite any authority that supports this crucial holding.

been in this State for less than ten days from the time the mother acquired a legal domicile. To say, under those circumstances, that the original Court *lost* [63] jurisdiction to determine custody, is to place a premium upon the taking of children from one state to another to avoid that court's jurisdiction.

It would be most particularly true in this county, which borders upon two other states, that a court could be deprived of making a just and equitable order for the control, care and education of minor children, by the simple expedient of removing the children from the State. I do not believe that that is the meaning of the law.

Therefore, under the peculiar circumstances of this case, I do not believe that the State of Wisconsin *lost* [63] its right to determine the legal custody of these children. The Writ will be granted as prayed for.

Exceptions to the Defendant.

SPECIAL FINDINGS OF LAW (R. 81-2) [64]

September 19, 1951

As conclusions of law, stated separately from the foregoing conclusions of fact, the Court finds:

a. That this Court had jurisdiction over the parties and the subject matter, and that the Wisconsin court's decree could be questioned by both parties in so far as it related to the custody of the children.

b. The Court, however, further finds, as a matter of law, that it is required by Article IV, §1 of the Constitution of the United States, to give full faith and credit to the Wisconsin decree in all particulars, to include the adjudication of the custody of the minor children of the parties.

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[63] The emphasis is added by counsel for Mrs. May. The trial court is holding that the jurisdiction of the Wisconsin court attached to the children *before* they left Wisconsin—*i.e.*, before any case or proceeding respecting their custody was ever filed in any Wisconsin court.

[64] At the request of Mrs. May (R. 76), the Probate Court found the facts and the law separately. As the findings of law are an expression of the trial court's opinion as to the applicable law, Paragraph 1 of Rule 12 would seem to require that they be set forth in this Appendix.

c. The Court finds that the legal domicile of the minor children, at the time of the filing of the divorce case [, was] in Waukesha county, Wisconsin, and that the Waukesha County Court had jurisdiction over the ~~subject~~ matter involved, namely: the care, custody and control of the minor children of the parties, and, therefore, the Waukesha county, Wisconsin, divorce decree is entitled to full faith and credit in all its particulars as dealing with the care, custody and control of the minor children.

d. The Court further finds as a matter of law, in addition to the statement of facts, that Leona Anderson May did obtain a domicile in Ohio some time between December 26, 1946 and January 6, 1947, when she made up her mind to reside in Ohio and not to return to Wisconsin and so informed her husband.

[d-1.][85] The Plaintiff husband in this case having never consented to change the home or domicil of said children to Ohio, and having never consented to their permanently leaving the State of Wisconsin, and the Plaintiff being the legal head of the family, and having established a home in Wisconsin for said parties and children, the legal domicile of the children, on January 6, 1947, and continuing through the time of the divorce decree, was still in Waukesha county, Wisconsin, within the territorial jurisdiction of the County Court.

e. The Court having determined that the Waukesha county, Wisconsin divorce decree was entitled to full faith and credit, as provided in Article IV, § 1 of the Constitution of the United States, and that said decree gave the care, custody and control of said minor children to the Plaintiff, Owen Anderson; and, further, that said children are being held by Leona Anderson, now May, against the wishes of the Plaintiff, Owen Anderson, and against the effect of the divorce decree hereinabove stated, and therefore unlawfuly and illegally, said children ought to be given into the Plaintiff's custody, as required by said decree.

[85] As the record shows (R. 76), these findings were dictated in open court and the paragraphing and punctuation are the reporter's, not the court's. We have therefore felt free to take minor liberties with it.

OPINION OF COURT OF APPEALS

December 15, 1951

(*Not* part of record.)[66]

GRIFFITH, J.

The appellant here, Leona Anderson May, is seeking a reversal of the judgment of the Probate Court of Columbiana County, Ohio, entered on the 21st day of September, 1951. That court allowed a writ of Habeas Corpus ordering the three minor children of Leona Anderson May and Owen Anderson, released to the custody of the father.

The Habeas Corpus proceeding is based upon a decree of a county court of Waukesha County, Wisconsin, wherein the custody and control of the children was awarded to the father, the relator in this case. The appeal was filed on questions of law and fact, but it has been submitted to this Court by counsel on questions of law, only, it appearing that the action is not a chancery case. The following facts were stipulated:

[Here appears the Agreed Statement of Facts already quoted in full in the opinion of the trial court on pages 2a and 3a above.]

Testimony of Mrs. May and Mr. Anderson was taken and, so far as the issues in this case are concerned, that is all the record that is pertinent to the solution of the instant problem. The conduct of the father and the mother of the children following the Probate Court's announcement of its

[66] While the opinion of the trial court is part of the official record in the case, the opinion of the Court of Appeals is not in the record. No copy of it is filed in the case, even unofficially. To get a copy of a Court of Appeals opinion in the particular Ohio appellate district involved, it must be purchased from the secretary to the Judges. When received, it bears no official authentication of any kind. We feel obliged by paragraph 1 of Rule 72 to insert here the opinion thus purchased by us. We wish to avoid, however, any representation that it is something more than or different from what it is.

decision, reprehensible as that conduct may be on the part of each,[67] has no bearing on the decision of this case.

The testimony of the father and mother bears directly on the conditions under which Mrs. May took the children from Wisconsin to Ohio.

Mr. May [*i.e.*, plaintiff Anderson] testified [on cross-examination (R. 11, 12)]:

> "A. I agreed that she could take them with her, after arguing the statement pro and con, she could take them with her. And if her mind was made up, she could settle things at home. That was the understanding I had when she left.
>
> "Q. Did she say she would bring the children back?
>
> "A. She agreed to it when she left.
>
> [* * *][68]
>
> "Q. When you had this telephone conversation with her on New Year's day, what was said?
>
> "A. The only thing I can remember is, 'Owen, I'm not coming back!'
>
> [* * *][69]
>
> "A. I called her up and asked her to bring the children back. [* * *][70] I asked ~~them all to come~~ back."

Mrs. May testified [R. 14] that at the time she left Wisconsin the children's ages were 8 years, 5 years and 18 months [and, following other testimony, further testified (R. 14, 15, 17) as follows]:

> "Q. What was the purpose in coming to Ohio?
>
> "A. ~~He told me~~ to get away by myself to think it over, or what I wanted to do. Either come back to him or separate.

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[67] The facts respecting the conduct of each party are briefly stated in the last three paragraphs of note 16, pages 16 and 17 of the brief.

[68] The opinion omits a question and answer.

[69] The opinion omits three questions and two answers.

[70] The opinion omits a question and part of an answer.

"Q. When you left Wisconsin, what was said about the children?

"A. Nothing was said. He said it was up to the court. He said he would never separate the three of them.

[* * *][71]

"Q. Was there anything said about bringing the children back to Wisconsin?

"A. Nothing was said.

"Q. What was your understanding?

"A. To come here and think it over, and I decided to stay.

"Q. What was your understanding about the children?

"A. There was no understanding. All I know was that I had them with me. When the papers were served I asked the attorneys what to do about signing the papers and they told me to stay here.

[* * *][72]

"Q. At the time you left Wisconsin had you made up your mind that you would not come back to Wisconsin?

"A. At the time I left, I really didn't know what I was going to do."

From the record before us, it is apparent that Leona Anderson May was a native of Waukesha,[73] Wisconsin; that she and Owen Anderson were married in the middle thirties and took up residence in Waukesha where they lived their entire married life. Their domicil and permanent home, freely chosen by both, was fixed in Waukesha up to December 26, 1946; that on December 26, 1946, Leona Anderson May left Waukesha with the three children and came directly to Lisbon, Ohio, where she established her domicil. That she brought the children to Lisbon with the knowledge and consent of the father to think over her domestic differences with her husband, and decide whether she would

[71] The opinion omits two questions and two answers.

[72] The opinion here omits two and a half pages of testimony.

[73] Mrs. May, although a native of Wisconsin (R. 21), was not a native of Waukesha. She came from a different part of the state.

longer live with him. That on New Year's day, she told her husband she was not coming back. That the father thereupon requested the return of the children as he had stated to the mother that the matter of their custody "was up to the court."

That on January 6, 1947, Owen Anderson filed his action in Waukesha for divorce and custody of the children and said divorce was granted to him on February 5, 1947, which decree was made in the absence of the mother and the children from the State of Wisconsin and without service or jurisdiction over them other than the substituted service in the divorce case.

The court awarded custody of the children to the father. The only service made on Leona Anderson May in the divorce case was through the Sheriff of Columbiana county, Ohio, who served her with summons and a copy of the petition. That no personal service of any nature was made upon Leona Anderson May in the State of Wisconsin. That neither she nor the children were in Wisconsin at the time the divorce petition was filed nor until long after the decree of custody and divorce was granted. That they at all times remained in Lisbon, Ohio. That in February, 1947, after the decree of divorce was granted, Owen Anderson came to Lisbon with a copy of the Waukesha court order and demanded and obtained from Mrs. May the children and took them back with him to Wisconsin.

Nothing happened during 1947, 1948, 1949, 1950, and the first half of 1951. The children remained with the father in Waukesha from 1947 until July, 1951. On July 1, 1951, Owen Anderson brought the children to Columbiana county and permitted them to visit the mother for a limited period of time. The mother now refuses to surrender the children back to the father, hence this proceeding.

When Mrs. May brought the children to Ohio in December, 1946, it was understood between her and her husband that it was a temporary and conditional taking[74] until she

[74] Mrs. May has attacked this finding throughout as contrary to the manifest weight of the evidence (R. 83) and testified that plaintiff Anderson told her she must decide either to "come back to him or separate" (R. 14). See note 13, page 13 of the brief.

could make up her mind regarding their marital difficulties. He permitted her to take them on this basis and if she did not return to Wisconsin, then the court would determine the matter of custody. "The court" unquestionably meant the Waukesha court which was the only court having jurisdiction over them at the time of their discussions.[75] She came to Ohio for a special and temporary purpose when she left Waukesha. She was uncertain as to her ever coming back.[76] Something occurred after she left which induced her to adopt Ohio as her permanent home.

Did the Court of Waukesha county, Wisconsin, in the divorce proceeding on substituted service against the mother when both the mother and children were in Ohio, have power or control over the children?[77]

Did the mother's change of domicil effect a change of domicil for the children?

The summons served in the divorce case amounted to constructive service or service by publication, although the Sheriff of Columbiana county, Ohio, personally handed Mrs. May the summons and copy of the petition.

WISCONSIN STATUTES, 1949

Section 262.12

> "When the summons cannot with due diligence be served within the state, the service of the summons may be made without the state or by publication upon a defendant when it appears from the verified complaint that he is a necessary or proper party to an action or special proceeding as provided in Rule 262.13 in any of the following cases: (1) (2) (3) (4) (5) when the action is for divorce or for annulment of marriage."

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[75] This statement is flatly contrary to the only evidence there is on the point (R. 18). It is quite clear, moreover, that when Mrs. May left Wisconsin, there had been no decision as to which of them would apply for the divorce in the event divorce was decided on (R. 15).

[76] It is urged that the evidence is correctly appraised by the Court of Appeals' statement that Mrs. May "was uncertain as to her ever coming back" when she left Wisconsin; not by its other inconsistent statements.

[77] Despite its pertinence, the Court of Appeals nowhere answers this question.

Section 262.13

> "In the cases specified in Rule 262.12 the plaintiff may, at his option, and in lieu of service by publication, cause to be delivered to any defendant personally without the state a copy of the summons and verified complaint or notice of object of action as the case may require, which delivery shall have the same effect as a completed publication and mailing."

Where were these children domiciled during the period of time between the filing of the divorce petition and the granting of the decree?

Two elements must concur to establish domicil — (1) residence, and (2) intention of remaining.

The domicil of a minor child is normally that of the father. A minor cannot change his domicil. Was the removal of these three children from Waukesha under the circumstances, such as to effect a termination of their domicil with the father there in Wisconsin? We think not.

She brought them to Ohio on a temporary and conditional basis with the understanding that they should be returned if she decided to separate from her husband. She decided to separate and then it was that the temporary permission ended. Until she said to him over the phone on New Year's day of 1947, "Owen, I'm not coming back!"

The children were domiciled in Wisconsin until December 26, 1946, *where the Wisconsin court had exclusive jurisdiction*, and that court did not *lose*[78] its jurisdiction by rea-

[78] All emphasis in the above passage is added by counsel for Mrs. May. As will be observed, the passage specifically repeats and thus approves the trial court's holdings (a) that the bare domicil of these children in Wisconsin gave the Wisconsin court jurisdiction to award their custody, and (b) that said jurisdiction had attached to the children *before* the children left Wisconsin — *i.e.*, before any case or proceeding respecting their custody had been filed in any Wisconsin court.

son of their going with their mother to Ohio to mediate and decide her program of life for the future. Temporary absence of the children from Wisconsin [79] could not change their legal settlement. The Wisconsin court did not lose jurisdiction while they were temporarily in Ohio.

While the facts in each of these cases are entirely different from the case before us, we believe the reasoning in the cases of *Cohen v. Judge*, 13 Ohio Appeals, 449, *Keenan v. Keenan*, 17 Ohio Dec. N. P. 581, *Black v. Black*, 110 O. S. 392, supports our conclusions.[80]

The children were in Ohio with his consent and permission. After that announcement, he demanded that she return the children, which demand was ignored. The children from that time forward were in Ohio against his will and without his permission. It was during that period of time that the divorce proceedings were commenced and concluded. The change of the domicil of the mother under these circumstances, did not in any wise effect a change of the domicil of the children.

The Court had no alternative but to allow the writ and its judgment on that order will be affirmed.

Judgment affirmed.

PHILLIPS, J., concurs.

NICHOLS, P. J.

I cannot concur in holding that the Court of Waukesha, Wisconsin, had jurisdiction to award custody of the minor children of the parties to that action, for the reason that

[79] It will be observed that, by thus holding, as a matter of law, that the children were only "temporarily absent" from Wisconsin, the Court of Appeals accepts also the Probate Court's holding that § 7996 deprived their mother of the legal power to alter their domicil.

[80] If the cases the court cites are examined, it will be found that the decision in *Keenan v. Keenan* went off on a point that makes it irrelevant here, that the *ratio decidendi* in *Cohen v. Judge* is flatly opposed to the position here taken by the Court of Appeals, and that *Black v. Black*, to the extent it is in point (and we think it is in point), is also flatly opposed to that position. Thus, the opinion of the Court of Appeals, like the

such children were not within the jurisdiction of that court at the time the petition for divorce was filed, or at the time the decree was rendered.

However, if I am right in my finding that the Waukesha court did not have jurisdiction, then this Habeas Corpus proceeding in Columbiana county was one solely to determine which of two parents having equal rights to children should be awarded custody thereof since the parents are not living together and cannot have joint custody and control thereof.

In this case, in the proceeding in Columbiana county, the court's judgment awarding custody to the father is entirely supported by the evidence and is for the best interests of the children.

I, therefore, concur in the judgment for the reasons stated.

(NOTE BY APPELLANT'S COUNSEL: As stated at the opening of appellant's brief under the heading "The Issue", the custody award required by the welfare of children is, in Ohio, an issue that habeas corpus *cannot* be used to try. And as the Probate Court notes at the end of the third paragraph of its opinion proper, no such issue was tried in this case.

(Since the issue of the children's welfare could not be and therefore was not tried in this case, it would be unfair to plaintiff Anderson to draw any inference as to that issue from evidence that came in on other issues. However, if such an inference were nevertheless to be drawn from that evidence, it would be the opposite of that stated in the foregoing concurring opinion.)

OPINION OF THE SUPREME COURT OF OHIO

Anderson, Appellee, v. *May, Appellant*, 157 Ohio St. 436, 105 N. E. 2d 648.

April 2, 1952

It is ordered and adjudged that this appeal of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

Weygandt, C. J., Middleton, Matthias and Hart, JJ., concur.[81]

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[81] As is evident from the fact that the report does not show part of the Judges "not participating", the case was heard before a full court of seven judges. As the report shows only the Chief Justice and three judges concurring; three Judges who participated did *not* concur. They were Stewart, Taft and Zimmerman, JJ.

In the Supreme Court of the United States

OCTOBER TERM, 1952,

No. 244.

LEONA ANDERSON MAY,
Appellant,

vs.

OWEN ANDERSON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

Appellee's Departures from Record.

Appellee Anderson's brief has made us sharply aware of two reasons not often mentioned why it is unfair for a lawyer to depart from the record in respects prejudicial to the other side:

The first is that it makes his opponents expand their brief, with the increase in printing costs for their client or clients which that entails, to the extent necessary to deal with such departures.

The second is that it forces on his opponents a distasteful choice—which is really no choice—between apparent discourtesy to him and being unfaithful to the interest they represent.

The only part of the record in the Wisconsin divorce case that was introduced in evidence in this case was its decree (R. 6, 90). The decree does not state, and, since the matter was not pertinent to the issue in the trial

court and was not inquired into, we do not know, the ground or grounds on which the divorce was asked for, or on which it was granted.

On page 8 of appellee Anderson's brief, in note 13, he states that a paper bearing date of January 2, 1947 and purporting to be a letter from the appellant, Mrs. May, was introduced in evidence in the Wisconsin case. He says the paper stated, "I don't intend to take the kids from you. You can have them." And that, after admitting "her guilt" (?), it further stated, "You can send me whatever you want me to have. If it's nothing, it's more than I deserve."

Several things are obvious, to wit: (1) The purported letter is *not* in the record in *this* case. (2) It is not relevant to any *issue* in this case. Therefore, (3) the only possible motive that can have inspired its importation here from *outside* the record is a hope that it may arouse prejudicial feeling against Mrs. May, to appellee Anderson's advantage.

It is likewise obvious that it is impossible for us, in Ohio, to have any knowledge of what went on in an *ex parte* proceeding in Wisconsin in which neither we nor our client appeared. It is perfectly apparent to us, however, that the existence of any such letter would give the lie to appellee Anderson's claim in the courts below, and apparently here also (see page 2 of his brief, note 1), that at the very time the purported letter is dated, he was demanding the return of the children and she was refusing to return them (see facts stated on page 15 of appellant's brief, to which statement appellee Anderson refers in the note cited above).

Courtesy to opposing counsel of course requires us to assume that the files of the Wisconsin case contain a paper purporting to be such a letter. After interviewing

our client, however, we categorically state on her authority that, if so, it is a forgery. She wrote no such letter.

In an equally flagrant digression from the record on page 9 of his brief, appellee Anderson *contradicts* the record when he says:

> "Why did not appellant oppose jurisdiction of the Wisconsin Court to determine custody of the children by appearing specially[1] to deny jurisdiction when she was apprised of such proceedings? * * * [A]ppellant had *ample opportunity*[2] to appear specially or even to present evidence of her fitness as a mother."

The facts that follow have been stated previously (pages 15 and 16 of appellant's brief) and appellee Anderson says (page 2 of his brief, note 1) that they are "not in dispute":

When appellant was apprised in Ohio of the proceedings in Wisconsin, she was without money (R. 16, 19). It is true that, alone, this fact would not necessarily have made her return to Wisconsin any total impossibility. Perhaps, under other circumstances, she could and would have risked hitch-hiking back to Wisconsin.

But she had the children with her in Ohio (R. 22). Their ages were then eight, five and eighteen months (R. 14). One of them was sick (R. 16). It was January or, at the latest, one of the first days of February, 1947 (R. 12, 15, 22).

Successfully to beg rides for herself and the three children from Ohio to Wisconsin at such a time and under

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[1] *Davis v. Davis* (1938), 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3, 118 A. L. R. 1518, which appellee cites on page 8 of his brief, illustrates rather graphically both the dubious propriety of special appearances in divorce cases and their hazards.

[2] In this brief, as in appellant's former brief, all emphasis inside quotations has been supplied by appellant's counsel unless the contrary is expressly noted.

such circumstances *was* an impossibility. Had she tried, the spectacle presented by the exposure in mid-winter to the hazards of such a journey of three infant children, one of them ill, would have lodged her in custody long before she reached Wisconsin. Indeed, after the able counsel then advising her had flatly told her to stay in Ohio (R. 15), it *would* have been criminal misconduct, morally as well as technically.

Thus the fact—the *record* fact—is that Mrs. May did *not* have "ample opportunity" to appear in the Wisconsin case, either "specially" or otherwise. The *fact* is that she did *not* have a chance "to present evidence of her fitness as a mother." The fact, as appellee Anderson well knows, is that she had no opportunity whatever to be heard on any question whatever in the Wisconsin case. The fact, indeed, may well be that her chance of ever having "her fitness as a mother" tried on its merits by *any* court depends on her prevailing in this Court and securing here a declaration that the Wisconsin court's purported disposition of her children is the nullity we contend it to be.

The foregoing effort to distort Mrs. May's inability to return to Wisconsin into a callous indifference to her children's fate, would have been sufficiently inexcusable if it were claimed that she was then a domiciled citizen of Wisconsin with some duty to respond to its summons, as was Meyer a domiciled citizen of Wyoming with a duty to respond to its summons in *Milliken v. Meyer* (1940), 311 U. S. 457, 85 L. ed. 278, 61 S. Ct. 339, 132 A. L. R. 1357.

Although it is not strictly material here, since Mrs. May was admittedly domiciled in Ohio before the Wisconsin case was started, we nevertheless want to make it perfectly plain that we do not concede that the service on Mrs. May in Ohio was such that it was capable, under any circumstances, of giving the Wisconsin court jurisdiction of her person. As *McDonald v. Mabee*

(Continued on following page)

But when it is elsewhere openly admitted that her home had become Ohio (page 10 of appellee Anderson's brief)—and it is thus necessarily conceded that Wisconsin had no right at all to summon her—the distortion seems really quite indefensible.

Other similar departures from the record are scattered through appellee Anderson's brief. Examples are the intimations on page 10 that this record shows that "there was no neglect of parental duty on the part of the father" (*i.e.*, appellee Anderson),—with a distinct accompanying implication that the record shows there *was* a "neglect of parental duty" by Mrs. May—and, on page 13, that this is a case

> "where children have been taken out of the state for the purpose of establishing a new domicil to defeat justice."

(Continued from preceding page)

(1917), 243 U. S. 90, 61 L. ed. 608, 37 S. Ct. 343, *Blackmer v. United States*, 284 U. S. 421, 76 L. ed. 375, 52 S. Ct. 252, and *Milliken v. Meyer*, above, all make clear, a State's obtaining jurisdiction of the person of one of its citizens who is outside its territory depends, not at all on power, but on *duty*—a duty imposed on the absent citizen by his allegiance to the State from which he is absent, to return in obedience to its summons. And *McDonald v. Mabee* makes it very plain that the summons, and the service thereof, if they are to be valid, must be of such character that it is realistic to say that they *do* place him under a duty to appear in response to the summons. Where, as here, a summons is served hundreds of miles beyond the border of the State issuing it, and where the person served is then destitute and no tender of traveling expenses is made, how realistic is it to hold that State has succeeded in imposing a duty to obey the summons on the person served? When the performance of the supposed duty to that State is impossible without its help, and when that help is not offered, is it not merely a denial of one of the first essentials of due process—namely, a fair chance to be heard—to hold that such a duty has been imposed and jurisdiction of the absent citizen's person obtained? In *Blackmer v. United States*, a tender of traveling expenses *was* made, and if the same thing was not true in *Milliken v. Meyer*, Meyer raised no objection to it.

To the extent the record in this case shows anything in either respect, it of course *contradicts* each of the foregoing.

To pursue the matter of such digressions further, however, would be to join appellee Anderson in his effort to divert attention from the issue in this case.

The one further departure from the record now mentioned, is mentioned because the effect is to get us back to the issue. On page 16 of his brief, appellee Anderson says:

> "It seems that Counsel for appellant overlooks the fact that the Wisconsin Court * * * took testimony relative to the fitness of the individual parent prior to the making of its order * * *."

The issue in this case is of course whether the Wisconsin court had jurisdiction. The attorneys for Mrs. May have no means of knowing, and it is in this case of no interest, whether the Wisconsin court received evidence or not. If it did *not* have jurisdiction, its purported custody order is *void*, even though it listened to testimony for a week. If it *did* have jurisdiction, its purported award is *valid*, even though the "evidence" supporting it commenced and ended with counsel's comments as the decree was being tendered for the court's signature.

ARGUMENT IN REPLY.

In order to clarify in our own minds appellee Anderson's position on the merits of this case, we shall take up in their order the main points in the case one by one and, under each, discuss what he has said in connection with that point:

This Court's Jurisdiction.

As in his contra-jurisdictional statement, appellee Anderson concedes that all technical jurisdictional requirements imposed by 28 U. S. C., §1257(2) are satisfied, by addressing himself, save for the non-jurisdictional digressions just noted, solely to the merits.

The Issue.

At the outset of his brief (page 3), appellee Anderson grants that we have stated the issue correctly, saying:

> "The one basic question involved is the validity of the Waukesha, Wisconsin County Court decree awarding custody of the children of the parties to the appellee and whether said decree is entitled to 'full faith and credit' [and] enforcement in the State of Ohio."

Another Issue?

Later, however, in a passage that occupies most of pages 14 and 15 of his brief and cites three of the five cases he has contributed to the authority cited in this case, he says:

> "that if the judgment on its face appears to be a 'record of a court of general jurisdiction', * * * jurisdiction over the cause and the parties is to be presumed unless disproved by *extrinsic evidence* or by the record itself".

and that, if the court's jurisdiction is *not* rebutted by the record or by extrinsic evidence, then, no matter how erroneous the judgment may be, it is entitled to "full faith and credit."

In support of these incontestable propositions, appellee Anderson, in addition to *Milliken v. Meyer* (1940), 311 U. S. 457, 85 L. ed. 278, 61 S. Ct. 339, 132 A. L. R. 1357, already several times cited by appellant, also cites the following: *Fauntleroy v. Lum* (1908), 210 U. S. 230, 52 L. ed. 1039, 28 S. Ct. 641. *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers* (1909), 213 U. S. 55, 53 L. ed. 695, 29 S. Ct. 397.[1] *Adam v. Saenger* (1938), 303 U. S. 59, 62, 82 L. ed. 649, 58 S. Ct. 454.

And earlier, on page 8 of his brief, appellee Anderson cites *Davis v. Davis* (1938), 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3, 118 A. L. R. 1518, one of the other two cases he has contributed, for the proposition "that full faith and credit must be given in each state to judicial proceedings of other states and applies to all courts Federal as well as State."

This expenditure of authority on points that appellant's brief takes for granted—certainly we nowhere dispute them—makes us wonder whether appellee Anderson is seeking to introduce *another* issue into the case. If so, what?

Is appellee Anderson claiming, by any chance, that the agreed statement of facts, or possibly the testimony in the trial court, is not properly in the record in this case, and that there is therefore no "extrinsic evidence" prop-

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[1] *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, above, extends the rule of *D'Arcy v. Ketchum* (1850), 11 How. 165, 13 L. ed. 648, to statutes. It holds that a purported statute which it was not within the power of a territorial legislature (New Mexico) to enact, is *not* entitled to "full faith and credit."

erly in *this* record to rebut the "presumption of jurisdiction" in Wisconsin?

The stipulation or agreed statement of facts was duly filed in the case and appears both in the common law record (R. 130) and in the bill of exceptions (R. 6, 21-3). The testimony and exhibits in the trial court are all in the bill of exceptions (R. 1 to 90—see especially R. 86-7 and R. 88), and the transcript of which the common law record and the bill of exceptions both form a part is duly authenticated by the Clerk of the Supreme Court of Ohio under the seal of that Court.

Thus, as far as we know, there is no such issue in this case, and the issue that the record does raise—the *sole* issue it raises—is still the issue with which we started in the trial court, to wit, the validity of the purported Wisconsin custody award and its consequent title, or lack of title, to "full faith and credit" under Article IV, §1 of the Constitution of the United States.

First Question.

Page 8 of appellee Anderson's brief tells us it is "irrelevant" that the service of the Wisconsin summons on Mrs. May in Ohio did not give the Wisconsin court jurisdiction of her person.

As the only thing we are interested in establishing in connection with this point is that the Wisconsin court did *lack* jurisdiction of Mrs. May's person, and as this is conceded, we turn to the next question.

Second Question.

Appellee Anderson not only refuses to meet the second question in this case; he refuses even to admit that it exists (see pages 2, 3 and 4 of his brief). Yet his own contentions squarely raise the question:

He contends (page 4 of his brief), and each of the courts below has of course held (see page 28 of appellant's brief, note 28), that the Wisconsin court had jurisdiction to dispose of these children *before* they left Wisconsin—i.e., *before* any case or proceeding was commenced in any Wisconsin court—and that the Wisconsin court did not "lose" its jurisdiction by their departure for Ohio.

The contention that the Wisconsin court already had jurisdiction of the children before the Wisconsin case was started, was forced on appellee Anderson by the facts: As he concedes (page 10 of his brief), the children were not named parties to the Wisconsin case or served in it. They were not in Wisconsin, but were throughout the case living with their mother in Ohio. The Wisconsin court, as we have just seen, did not have jurisdiction of their mother's person.

As a court must first *acquire* jurisdiction before it can "lose" it, the foregoing contention merely raises the question: *How* did the Wisconsin court *acquire* this alleged jurisdiction to dispose of these children that appellee says it did not "lose" when the children left?

The courts below hold (see second parenthetical reference above), and appellee Anderson contends throughout his brief, that the Wisconsin court *acquired* jurisdiction to dispose of these children by virtue of their "domicil" in Wisconsin. Necessarily, therefore, since the children were *born* domiciled in Wisconsin, the contention is that the Wisconsin court, and indeed all Wisconsin courts legally capable of receiving such jurisdiction, acquired jurisdiction to dispose of these children at their *birth*.

Thus, despite appellee Anderson's refusal to admit that the question exists, his own contentions here do flatly raise the following question:

THE QUESTION APPELLEE'S CONTENTIONS RAISE.

Can it be held, compatibly with the principles of public law implicit in Article IV, §1 of the Federal Constitution that are protected against Federal violation by the 5th Amendment and against State violation by §1 of the 14th Amendment, that a United States citizen's domicil and consequent citizenship in a State, and the mutual obligation of *allegiance* between the citizen and the State that results,[5] give the courts of that State jurisdiction, without serving him with process or even giving him notice, to adjudicate him to be a minor or other incompetent[6] and then commit him to custody?

[5] On page 8 of his brief, appellee Anderson says: "We are here concerned over jurisdiction in *divorce* matters only." And on page 10, he says: "Jurisdiction over the children of the parties lies in the relationship of marriage and divorce" (*sic*). In truth, of course, we are in this case no more concerned with the conceptions of the *canon* law that govern "*jurisdiction* in divorce" and the jurisdictional effect of "domicil" both in divorce cases and in the probate of decedents' wills and the administration of decedents' estates, than we are with the jurisdictional concepts, if any, that exist in the tribal law of the Bantu. Fortunately for the liberty of the citizen, the jurisdiction to adjudicate persons to be minors or otherwise incompetent and then commit them to custody, was never within the competence of the ecclesiastical courts. The jurisdiction has always been the exclusive property of the common law and chancery, and it is with the principles of jurisdiction accepted by the common law and chancery, solely, that we are here concerned. These principles attribute to "domicil," as such, no jurisdictional significance whatever. Such jurisdictional effect as they permit domicil is indirect, and is purely incidental to the operation of the rule that, if the sovereign lets a person make his home within the sovereign's territory and the person does so, the mutual obligation of *allegiance* arises between them. The existence of a bond of allegiance of course *does* have jurisdictional significance, although none, we believe we have shown in appellant's brief, that could have given Wisconsin the slightest power to dispose of the children in this case.

[6] On page 10 of his brief, appellee Anderson objects to our defining the jurisdiction with which we are here concerned as the jurisdiction to adjudicate alleged "minors and incompetents" to be such and then commit them to custody. Since he gives no grounds for his objection, we shall not elaborate the reasons

(Continued on following page)

Appellee Anderson, although he refuses to admit openly that the foregoing question exists, has been unable to resist taking various pot shots at our statement of it, thus showing that he is in fact very well aware of its existence indeed, and that his trouble is that he cannot think of any plausible answer to it but the word "No." His pot shots have been dealt with in the margin in the footnotes appended to the foregoing statement of the question.

Appellee Anderson's One Argument.

He further betrays his knowledge that the question exists by half-heartedly slipping into his brief this argument, namely, that the "status" of the children is a *res*, of which the children's original domicil in Wisconsin somehow gave that State "jurisdiction," and that the Wisconsin court's purported disposition of these children was merely an exercise of Wisconsin's "jurisdiction" of their "status."[7]

(Continued from preceding page)

that led us to accept the foregoing definition as right, but shall merely repeat what was said in note 8 on page 5 of appellant's brief, namely: The jurisdiction to adjudicate persons to be minors or otherwise incompetent and then commit them to custody is, by all authorities we have encountered, treated and regarded as an integral whole, a *single* jurisdiction, with respect both to the foundations of the jurisdiction and the requisites for jurisdiction. See, for example, the sections of the *Restatement of Conflicts* collected on pages 44-5 of appellant's brief.

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[7] The summary of appellee Anderson's intended argument on the first index page of his brief reads: "a. Domicil of Children in Wisconsin. b. Jurisdiction of Wisconsin Court to determine custody of children. (1) Jurisdiction of *res*."

To find out what *res* was being talked about required a certain amount of detective work. However, on page 9 of his brief, appellee Anderson says:

> "In the case at bar, the Wisconsin court had jurisdiction of the *res*, or subject matter, by reason of the domicil of the children in Wisconsin * * *."

(Continued on following page)

We have combed appellee Anderson's brief. The foregoing is the only thing at all resembling an effort to answer appellant's argument on the above question that we have been able to discover. Apparently, therefore, it is our duty to reply to it.

Reply to Appellee's Argument.

His argument, as is perhaps obvious without our comments, is an almost classical example of an argument that involves words of more than one meaning and depends for its success on sliding without detection during the course of the argument from one set of meanings to another.

The words involved are "status" and "jurisdiction," and by taking as a text the following passage from this Court's opinion in *Pennoyer v. Neff*,[*] a passage that contains both words, we shall be able to follow perfectly the course of appellee Anderson's argument and the shifts in word meanings on which it rests:

> "One of these principles [*i.e.*, the 'two well established principles of public law' this Court has just said it

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(Continued from preceding page)

This of course still left the problem of the identity of the *res* that was supposed to constitute the "subject matter." On page 16 of his brief, however, appellee Anderson puts a question that clears this point up too, namely:

> "* * * why should a minor have to be served with process to adjudicate his or her *status* * * *"?

(The theory underlying appellee Anderson's question, apparently, is that children, so far as they themselves are concerned, are like livestock, without rights that the law need respect. So far as their *parents* are concerned, the theory would seem to be that the children are *less* than livestock. Since *Pennoyer v. Neff*, no court would dare purport to dispose of livestock without having either *possession* of the animals or else jurisdiction of their owner's *person*.)

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[*] 95 U. S. 714, 24 L. ed. 565, 568.

> relies on in *Penncyer v. Neff*] is, that every State possesses *exclusive jurisdiction* and sovereignty over *persons* and *property* within its territory. As a consequence, every State has the power to determine for itself the civil *status and capacities* of its *inhabitants*; to prescribe the subjects on which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligation enforced; and also to regulate the manner and conditions upon which *property* situated within such territory, may be acquired, enjoyed and *transferred*. * * *"

As will be observed, the passage does say that a State has "jurisdiction" to determine for itself the "status" of the people domiciled in it. Thus, what it says does bear a certain superficial resemblance to what appellee Anderson argues.

Let us look, however, at the meanings in which, in the passage quoted, this Court actually uses the words in question:

The passage uses the word "status" in the ordinary meaning the word has in both the speech of the public (see any edition of *Webster's*) and common legal parlance (see *Black's* and *Bouvier's* law dictionaries), to wit, the "state or condition of a person" in the world—his legal position vis-a-vis the rest of the community. The "state or condition" of a "free and legal man," who has the full complement of legal capacities in dealing with the rest of the world that the common law allows anyone, is of course the norm. Every other status, such as that of a prisoner, an infant, a lunatic or, formerly, a villein (or married woman), is a "state or condition" of *lacking* various of the legal capacities that belong to the full complement just mentioned.

Since, in this sense, the "status" of an infant or lunatic consists of an *absence* of normal legal capacities, it is apparent that manufacturing a *res* out of it would be a reasonably perfect illustration of making something out of nothing. Possibly the activity might provide a product suitable for the man who is said to to sell holes for doughnuts to add to his line.

Respecting the word "jurisdiction," the Court uses it in the foregoing passage in the sense of a State's authority to have *laws* to which persons who inhabit, and things that are within, its territory are subject. The message of the passage, indeed, is simply that a State does have "jurisdiction" to have such *laws*.

Turning now from the meanings in which this Court used the words "status" and "jurisdiction" in the above passage to the meanings to which appellee Anderson has shifted, he shifts in the case of "status" to a meaning the writers on conflict of laws have quite arbitrarily (so far at least as the normal usages of the English language and the common law are concerned) assigned to it—a meaning the *Restatement of Conflicts* puts in these words:

> "§ 119. STATUS DEFINED. In the Restatement of this subject, a 'status' means a legal *personal relationship*, not temporary in nature nor terminable at the mere will of the parties, with which third persons and the State are concerned."

From other parts of the *Restatement*, which talk of the "status" of guardian and ward, of parent and child, of husband and wife, etc., it is evident that it is *domestic* relationships with which the above definition is especially concerned. (Apparently, a child whose mother dies in

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[9] In the normal sense of the word "status," a husband has never had any abnormal status. If they were free, sane and 21, husbands and bachelors alike, and for most purposes a *femme sole* as well, were equally "free and legal men."

childbirth and whose father was dead before he was born has no *Restatement* "status." The same thing would be true of a lunatic for whom no guardian or custodian has been appointed. No "personal relationship," no "status"!)

By this shift, as will be noted, appellee Anderson has provided himself with a *res*, or rather several of them, namely, the "legal personal relationships" between each of the children and appellee Anderson and each of the children and Mrs. May. (We have of course already shown on pages 25 to 27 of Mrs. May's brief that, whatever jurisdiction the Wisconsin court might have acquired over the "personal relationship" between appellee Anderson and each of the children by giving the children notice—which is something it did not do—it was entirely *without* power to acquire jurisdiction over the "personal relationships" between Mrs. May and her children. They were all *in Ohio*.)

The meaning of "jurisdiction" to which appellee Anderson shifts is of course a *court's* jurisdiction to hear and determine questions in litigation before it.

Thus, out of this Court's statement in *Pennoyer v. Neff* and other cases that a *State* has "jurisdiction" to determine the "status" of its inhabitants, appellee Anderson, by means of the foregoing shifts in the meaning of those words, extracts the proposition that a citizen's bare domicil and consequent citizenship in a State confer on the *courts* of that State—with *no* need to bring the citizen before any of those courts by process—full jurisdiction to determine and alter his "legal personal relationships" (or "statuses") as it thinks proper, and, as part of the process of doing so (although this involves a series of rapid shuttlings back and forth between the normal meaning of "status" and the artificial meaning attached to it by the conflicts writers), to adjudicate him to be a minor or lunatic and commit him to custody if it sees fit.

From this Court's accompanying statement that a State has "jurisdiction" over all "property" in its territory, and over the manner in which such property may be "transferred," it would, by like reasoning, be possible to extract the proposition that the State's courts are all constantly vested, without any need to seize the property by their process, with "jurisdiction" to transfer all the *property* in the State to whomever they please.

Needless to say, *Pennoyer v. Neff* stands for precisely the contrary propositions:

Pennoyer v. Neff explicitly holds that the bare presence of property in a State gives the *courts* of that State *no* jurisdiction whatever of that *property*. It explicitly holds that a court can have *no* jurisdiction to bind a man *personally* unless it first gets jurisdiction of his *person*. And, in the parallel this Court throughout draws between jurisdiction over persons and property, it is *implicit* that the bare presence of a *person* in a State, or the bare presence there of his habitation, his domicil, gives the courts of that State no more jurisdiction of his *body*, which is preeminently his property, or of his *liberty*, which is equally so, than does the bare presence of any other part of his property in the State give its courts jurisdiction of *that* property.

In short, the argument that, because the State of a person's domicil and consequent State citizenship has "jurisdiction" of his "status," its *courts* have jurisdiction, without serving him with process or even giving him notice, to adjudicate him to be a minor or lunatic and then commit him to custody, rests on nothing more substantial than the froth of a double play on words.

It might be added that the power of a State's legislature is no more extensive, in any respect pertinent here, than the power of its courts. A bill of pains and penalties

by which a legislature purported to single out a citizen and, by its fiat, declare him to be a minor or lunatic and order him committed to custody would, obviously, be void as a bill of attainder.

Second Question, Conclusion.

In both her jurisdictional statement and brief, Mrs. May has urged that there are two assumptions only on which any such jurisdiction as that asserted by the courts below on behalf of Wisconsin could be supported, namely:

> "*First*, that human beings are the chattel property of the State to which they are subject, and therefore that, whether they are inside that State or outside it, it has power, through its legislature or courts, to deliver a bill of sale or deed of gift of any of them to whomever it may select, which the courts of the place where he is will be bound to honor; or
>
> "*Second*, the assumption of the Civil law, on which most if not all Western absolutisms have been built, that supreme and uncontrolled power exists in the emperor (or State) * * * 'because to him and in him the *people* have yielded up all their power and authority.' In short, said assumption is, the State, whether embodied in an emperor, a king or a legislature, holds an unlimited and irrevocable power of attorney from the 'people,' every one of them, and if the State chooses to sell a member of the people into slavery, or execute him, no wrong has been done him because it is his own act. Legally, *he* has sold *himself* into slavery, or committed suicide."

Appellee Anderson has been entirely unable to suggest any other assumption on which such a jurisdiction as that he here asserts for Wisconsin can rest.

If it is true that the foregoing assumptions are the only ones possible, then the real question in this case is a simple one: In the year 1947, at the time of the purported

proceedings in Wisconsin, did the people of the United States still retain the free status—the "liberty"—which, at the close of the next to the last decade of the 18th century, their predecessors, the then people of the United States, wrote and promulgated the Constitution of the United States to secure "to ourselves and our posterity"? Or, in some process of erosion, had it gradually weathered away?

Third Question.

It is necessary to review appellant's argument on the third question briefly in order to segregate the points appellee Anderson does not dispute from those on which he takes issue with us.

The third question arises because the courts below have held that § 7996, Ohio General Code, erects an invisible fence around Ohio through which a married woman cannot move the domicil of her children into Ohio without their father's consent, and that, since § 7996 thus fenced the domicil of these children *out* of *Ohio*, it stayed in Wisconsin. We contend that, as thus construed and applied, § 7996 is repugnant to each and every clause of § 1 of the 14th Amendment.

We urge first that, although a State of course still has power to prescribe rules regulating the place *within* the State which shall be regarded as the home of each of its citizens, the first sentence of the 14th Amendment has made the question of the *State* within which each citizen of the United States (be he man, woman or child) is domiciled—and of which he is therefore a State citizen, owing to it his *State* allegiance—a matter of *Federal* law exclusively, and that the question is thus necessarily a *Federal* question of which this Court is the final arbiter.

Appellee Anderson has not, on this contention, taken any issue with us, and, in view of the lucid and imperative language of the first sentence of the 14th Amendment, it is difficult to see how the proposition could be thought open to dispute.

We did not, in our argument in chief, in any way neglect the question of what the Federal law is, but there contend that, so far as a married woman's power to change her *own* domicil and consequent State allegiance and citizenship from State to State is concerned, she receives that power and privilege from the first sentence of the 14th Amendment directly, and that it is beyond the power of any State to abridge. We further contend that any effort by any State to abridge it would violate the due process and equal protection clauses as well.

On these propositions also, appellee Anderson takes no issue with us, conceding on page 10 of his brief that Mrs. May's own domicil did become Ohio when she went there with the children and decided to remain in Ohio to live.

Concerning the Federal law respecting a wife's power to change her *children's* domicil and consequent State allegiance and citizenship from one State to another, we contend in our argument in chief that, once it is granted that a married woman has the power to change her *own* home and State allegiance, it follows from the provisions of the 14th Amendment that she cannot lawfully be deprived of the liberty and power to make a home for her children with her: (1) To do so would plainly *abridge* the privilege conferred on her by the first sentence of the 14th Amendment freely to move her *own* home from one State to another. (2) There is no conceivable *rational* ground on which it can be held that the physical fact of being a female makes a mother *less* fit to make a home for her

children than is their father. Therefore any rule that purports to deny a mother the power to establish a home for her children without their father's consent, but at the same time allows him, without their mother's consent, to move the children's home wherever he pleases, is necessarily arbitrary and capricious. If any discrimination could be reasonable and rational, the rational discrimination would be the other way. Consequently, such a rule, if State, is repugnant to both the due process and equal protection clauses of the 14th Amendment, and a Federal rule of such purport would violate the 5th Amendment.

We do not find any place where appellee Anderson takes issue with the proposition numbered (1) in the preceding paragraph, or, indeed, that he anywhere takes issue with our contention under (2) that there is no rational ground on which it can be held that a mother, because she is a female, is less fit to make a home for her children than is their father.

He takes violent issue, however, with the *conclusion* respecting the Federal law to which these propositions necessarily lead, to wit, that the power of the husband and the wife to make a home for the children of their marriage is *equal*.

He contends that, arbitrary or not, capricious or not, it is "settled" by a "mass of authority" that the "mother, under the law, cannot establish the domicil of the children without the consent of the father," that "the children's domicil follows that of the father," that "to challenge this established concept is to challenge the very basic long established concepts of the law of our land," and therefore that taking from the wife the liberty and power to make a home for her children "does not deprive her of due process of law nor of equal protection of the law." She has, he contends, forfeited all interest in her children by

marrying their father, anything in the Constitution of the United States to the contrary notwithstanding, "for the the marital status brings with it obligations and privileges, benefits and detriments, disadvantages and compensations which are contracted upon when entering the marriage relationship." The maxim, "Husband and wife are one, and he is the one", was inadvertently omitted.

Since, as we have just seen, the first sentence of the 14th Amendment makes the question of the *State* in which a citizen of the United States is domiciled, and which is consequently the State of his citizenship and State allegiance, one of *Federal* law; and since the only power given Congress by the 14th Amendment is the power "to enforce" it, appellee Anderson would seem to be asking this Court to fasten upon the United States as a straightjacket, alterable only by constitutional amendment, the law of the 15th century respecting the condition of married women on which he relies.[10]

Perhaps if, at the time the 14th Amendment was adopted in 1868, the 15th century rules respecting the civil condition of married women had been in full force and vigor in the United States, this Court might feel helpless to hold anything except that the 14th Amendment had incorporated them by reference—although, even in that case, we should have argued with all the energy at our command that the 14th Amendment *could* not so operate, that its manifest purpose was to *free* persons from bond-

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[10] We specify the 15th century advisedly since, in earlier centuries, the condition of married women had been by no means so abased as, during the 14th and 15th centuries it became. *Holdsworth* (A History of English Law), 5th ed., iii, 523. In short, the condition of married women was a result, not of any application of legal principle, but, as the courts at all times freely admitted, of a recognition of custom—in our opinion "bad custom": that, had the courts admitted it to be such, the principles of the common law would have *forbade* them to recognize.

age, not in any case to rivet their shackles on them more tightly.

But the 15th century rules respecting the condition of married women were *not* in full force and vigor in the United States in the year 1868. They had never had any too friendly a reception on this side of the Atlantic, and, as previously pointed out (page 53 of appellant's brief), within two years of the adoption of the 14th Amendment, in *Cheever v. Wilson* (1870), 9 Wall. 108, 124, 19 L. ed. 604, 608, this Court *held:*

> "'It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well *settled* that it would be idle to discuss it."

The law did not become "settled" in two years, and *Cheever v. Wilson,* not appellee Anderson's reminiscences concerning the medieval rules on the subject, represents the law as it was understood at the time the 14th Amendment was adopted.[11]

The fact that, when the 14th Amendment was adopted, a married woman had already achieved the power to change her own domicil is, we urge, dispositive of the question that remains here, which is whether a married woman ought, as a matter of Federal law, to be held to have the same power as her husband to change her *children's* domicil!

The common law has never known any such thing as a "unity" or "identity" of husband and *child. Worrell v.*

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[11] As early as 1831 and 1832, in States as widely separated as Indiana and Maine, it was taken almost for granted that a married woman might have a domicil of her own. *Tolen v. Tolen* (1831), 2 Blackf. (Ind.) 407. *Harding v. Alden* (1832), 9 Maine (Greenl.) 140. As is evident from the latter case, the law was regarded as thus settled in Rhode Island in 1828. For the Ohio cases, see page 52 of appellant's brief.

Worrell (1939), 174 Va. 11, 4 S. E. 2d 343, 346. *Signs v. Signs* (1952), 156 Ohio St. 566, 570, 574, 103 N. E. 2d 743. (And see authorities collected in each case.) The inability of a wife to change her child's domicil was, like her inability to change her own domicil or to own chattels in her own right, merely one of the incidents of the complete merger, for civil purposes, of her legal personality into her husband's. The instant that merger was broken to the extent necessary to let a wife have a domicil, a home, for herself, separate from her husband's (as *Cheever v. Wilson* and the cases referred to in the margin demonstrate it had been when the 14th Amendment was adopted), it was necessarily broken to the extent necessary to let her make that home the home of her children also.

Let us now look at the "mass of authority" by which appellee Anderson says his position is supported:

The first case he cites, *Glass v. Glass* (1927), 260 Mass. 562, 157 N. E. 621, 53 A. L. R. 1157, involved the effect on a child's domicil of a custody award to the husband made in a New Jersey divorce case brought at a time when the husband, wife and child were all domiciled in New Jersey and in which each prayed for divorce and custody of the child. The wife moved to Massachusetts i the middle of the case, taking the child with her, but remained an active litigant throughout. In accord with the uniform rule that the domicil of a child is that of the parent to whom its custody has been *validly* awarded, *Glass v. Glass* holds that New Jersey is the child's domicil. The case contains not the slightest intimation that if the New Jersey award had been to the wife, the holding would not have been that the child was domiciled in Massachusetts.

Yarborough v. Yarborough (1933), 290 U. S. 202, 78 L. ed. 269, 54 S. Ct. 181, 90 A. L. R. 924, cited in appel-

lant's argument in chief, involved the validity, as against the child, of a consent order made in a Georgia divorce case providing that the husband should place a lump sum in trust in full satisfaction of all future claims for the child's support. The child, whose custody was awarded to the wife, was not made a party, but, according to the law of Georgia, the right that the husband should support the child was not vested in the child, but in the wife (290 U. S. 210). As in *Glass v. Glass*, the husband, wife and child were all domiciled in the State when the case was brought, the husband and wife both appeared as active litigants, and the Georgia court's jurisdiction was as complete as it could become—short, at least, of joining the child as a party, which this Court held was unnecessary since the right to support was not the child's property. Unless, therefore, this Court intended to intimate *both* that a parent still retains the power, *after* he has submitted the matter of his child's custody to a competent court of the State of his child's domicil, to shift the child's domicil *out* of that State while the matter is *sub judice*, and also that, if the parent does so, he thereby successfully *divests* that court's vested jurisdiction, this Court's expression that wives in general do not have the power to change their children's domicil, occasioned by Mrs. Yarborough's moving with the child from Georgia to South Carolina during the Georgia case, would seem not to have been necessary to this Court's decision.

Wear v. Wear (1930), 130 Kan. 205, 285 P. 606, 72 A. L. R. 425, also previously cited by appellant, requires no comment save that it is scarcely an authority for appellee's position.

Lanning v. Gregory (1907), 100 Tex. 587, 99 S. W. 542, 10 L. R. A. n.s. 690, 123 Am. St. Rep. 809, as stated in appellant's brief, is now flatly overruled by *Wicks v.*

Cox (1948), 146 Tex. 489, 208 S. W. 2d 876, 4 A. L. R. 2d 1, which indicates that it is possibly overruled by earlier Texas cases also.

In re Francis (1947), 75 N. E. 2d 700, 49 Ohio Law Abs. 427, previously cited by the trial court, is a nisi prius decision by a Probate Court in an adoption case. In Ohio, the consent of each parent to an adoption is required by statute unless he has "willfully" failed properly to support the child for the two years before the petition for adoption is filed. In *In re Francis*, the father had not consented. After discussing for some pages a variety of interesting subjects, including the domicil of children, the court found that the failure of the father to support his child was *not* "wilful," that his consent thus *was* required by the statute, and that the petition for adoption must therefore be denied.

Thus, if we read the cases cited by appellee Anderson correctly, the passages he relies on, to the extent they have not been overruled, are dicta unnecessary to the decision.

Time has not let us, since we received appellee Anderson's brief, collect anything we can call a "mass of authority." But we have managed to bring together six cases, each of which, if we read it correctly, flatly holds that, where the parents have separate domicils—as was concededly true here—the child's domicil follows that of the parent with whom he is in fact living. The six cases are:

White v. White (1913), 77 N. H. 26, 86 A. 353.

Callahan v. Callahan (1944), 296 Ky. 444, 177 S. W. 2d 565, specifically approved in *Abbott v. Abbott* (1947), 304 Ky. 167, 200 S. W. 2d 283, of which headnote "3" in "S. W. 2d" reads, "Minor children's domicil follows that of their natural parent with whom they are living."

Oxley v. Oxley (1946), 81 App. D. C. 346, 159 F. 2d 10.

Boardman v. Boardman (1948), 135 Conn. 124, 62 A. 2d 521, 13 A. L. R. 2d 295.

Hanson v. Hanson (1948), 150

Neb. 337, 34 N. W. 2d 388. *Worden v. Worden* (1949), 148 Tex. 356, 224 S. W. 2d 187.

Thus, respecting the Federal law, we urge it to be that, where husband and wife have separate domicils, the domicil of a child of their marriage is that of the parent, be it the father or the mother, with whom the child is making his home in fact, on three grounds, to wit: *First*, § 1 of the 14th Amendment, from the point of view of whichever of its clauses it is approached, requires that the right of the parents to make a home for their children be equal. *Second*, any such doctrine as "unity" or "identity" of father and child is wholly unknown to our law and, therefore, the moment the "unity" of husband and wife is admitted to be broken to the extent necessary to let the wife have a home of her own, it is necessarily broken to the extent necessary to let her make that home her children's home also. *Third*, to the extent the decided cases speak clearly, this is their holding.

WHEREFORE: For each of the reasons appellant urges in her argument in chief, each of which reasons we urge stands wholly unanswered by appellee, appellant respectfully asks that the judgment of the Supreme Court of Ohio be reversed.

Respectfully submitted,

RALPH ATKINSON,
F. W. SPRINGER,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 244

LEONA ANDERSON MAY,

Appellant,

vs.

OWEN ANDERSON

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

I. ENGLE,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 244

LEONA ANDERSON MAY,

Appellant,

vs.

OWEN ANDERSON

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

I. ENGLE being first duly sworn on oath deposes and says that he is plaintiff's co-counsel in the above entitled action; and that this affiant makes this Contra-Jurisdictional Statement and Motion in opposition to the defendant's appeal to the Supreme Court of the United States on the grounds that the Supreme Court of the United States does not have jurisdiction of this matter and there is no debatable constitutional question involved. Reasons given are as follows:

1. There is only one basic question involved, namely, the validity of the Wisconsin decree awarding custody of the

children of the parties to the plaintiff. The law is well settled that domicile follows the husband and the wife must conform to the husband's place of living when such is reasonable. The Wisconsin Court had jurisdiction of the res, or subject matter, by virtue of the domicile of the children in Wisconsin, and the Trial Court and Appellate Court of Ohio correctly held that the Wisconsin Court had therefore jurisdiction to determine the custody of the children since the children were domiciled in the State of Wisconsin at all times during which consent of the father was present; that a temporary leave from the State of Wisconsin would not deprive the children of the original domicillary status.

2. The Trial Court and Appellate Court of Ohio correctly held that the full faith and credit clause of the constitution was applicable to this situation and held that the Wisconsin decree was valid in Ohio.

3. That the fourteenth amendment to the constitution has not been violated as the defendant claims since equal protection of the law was afforded to the defendant at all times; that the mere fact that the defendant cannot change the domicile of the children during her marriage to the plaintiff in no way discriminates against the defendant nor takes her liberty without due process of law. If the defendant were divorced or permanently separated from the plaintiff at the time that the divorce action was commenced and if she had the children at the time of such separation or divorce she could then have established the domicile of the children at such place that her place of abode was established.

4. That the Appellate Court of Ohio in upholding the Trial Court has correctly applied the law to the facts and has found that "no debatable constitutional question is involved" and we respectfully submit to the Court that the Supreme Court of the United States has no jurisdiction in this matter for the reasons aforementioned.

WHEREFORE, THIS AFFIANT MOVES FOR AN ORDER dismissing the appeal to the Supreme Court of the United States and for affirmation of the judgment of the Trial and Appellate Courts of the State of Ohio.

Dated this 10th day of July, 1952.

I. ENGLE,
Counsel for Appellee.

(3183)

Brief of Appel-lee

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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LEONA ANDERSON MAY,
Defendant-Appellant,

vs.

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Plaintiff-Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF APPELLEE

I. ENGLE,
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APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF APPELLEE

OPINIONS BELOW

The memorandum opinion of the Supreme Court of Ohio has been officially published. *Anderson v. May* (1952), 157 Ohio St. 436, 105 N.E. 2d 648.

The Court of Appeals' opinion has not been published in the official Ohio Appellate Reports. It has, however, been published. *Anderson v. May* (1952), 107 N.E. 2d 358, 62 Ohio Law Abst. 324, 48 Ohio Op. 132.

The Probate Court's opinion has not been published.

The judgment of the County Court of Waukesha County has not been published.

PRELIMINARY STATEMENT

This brief is filed in support of the motion of the appellee Owen Anderson to affirm the judgment of the lower courts upholding the Wisconsin decree awarding custody of the children of the parties to the father and dismissing the constitutional questions raised as not debatable and as validly resolved by the lower courts.[1]

JURISDICTION

The constitutional questions raised by appellant are neither substantial or debatable. These involve challenge to validity of *General Code of Ohio*, section 7996, Article IV, section 1, the full faith and credit provision, and the Fifth and Fourteenth Amendments to the Constitution involving "due process of law" and "equal protection of the laws." The two lower Ohio courts have resolved these questions in favor of appellee after careful consideration, and the Supreme Court of Ohio has decided that "no debatable constitutional question is involved."

The questions raised by appellant concern rather the jurisdiction of a court over a child's custody when said child is outside the state — not constitutional questions.

QUESTIONS PRESENTED

Appellant contends that the "due process" and "equal protection clauses" of the 14th Amendment and the 5th Amendment to the Constitution have been violated and that Article IV, Section 1 of the Constitution of the United States, the "full faith and credit clause", must be extended to meet jurisdictional standards imposed by

[1] The statement of facts as presented by appellant are substantially correct, and not in dispute.

the 5th and 14th Amendments; and further contends that these fundamental constitutional rights have been violated. The one basic question involved is the validity of the Waukesha, Wisconsin County Court decree awarding custody of the children of the parties to the appellee and whether said decree is entitled to "full faith and credit" enforcement in the State of Ohio. This question in turn leads to the crux of this case — where were the children domiciled in January, 1947?

SUMMARY OF ARGUMENT

The children of the parties were domiciled in the State of Wisconsin, the residence and domicil of the father; and their temporary visit to Ohio with the mother did not change their domiciliary status to deprive the Wisconsin Court of jurisdiction of the children of the parties.

Article IV, Section 1 of the Constitution of the United States providing for "full faith and credit" to be given to adjudications of sister states was adhered to when the Probate Court of Ohio and the Court of Appeals of Ohio gave full faith and credit to the decree of the Wisconsin County Court of Waukesha in awarding custody of the children to the father on the evidence before the Court.

The 5th and 14th Amendments to the Constitution of the United States providing for "due process of law" and "equal protection of the laws" was afforded the mother in every respect and the mere fact that the mother, under the law, cannot establish the domicile of the children without the consent of the father does not deprive her of due process of law nor of equal protection of the law for the marital status brings with it obligations and privileges, benefits and detriments, disadvantages and compensations which are contracted upon when entering into the mar-

riage relationship. Because of this relationship the children's domicile remained in Wisconsin and the Wisconsin Court had discretionary powers as to custody of the children and such award is entitled to "full faith and credit."

ARGUMENT

Appellant left her husband and established domicile in Ohio. Did this action affect the domicile of the children?

It is the contention of appellant that the wife has the legal power to move her children wherever she pleases and to establish the children's domicil for them. This line of reasoning is contrary to all established law. The law is well settled that domicil follows that of the husband and the wife must conform to the husband's place of living when such is reasonable.

The fact of the matter is that the trial court of Ohio finds it was the understanding of the parties that appellant's stay in Ohio would be only temporary and that she would return to Wisconsin with the children before anything permanent was done about their marital status.[2] Appellee never consented to his children permanently leaving Wisconsin. The children were in Ohio less than ten days after their mother acquired an Ohio domicile. Did the Wisconsin Court lose jurisdiction to determine custody under these circumstances?

Appellant has attacked the validity of section 7996, *Ohio General Code* on the ground that, as construed and applied in this case, it is repugnant to section 1 of the 14th Amendment. The statute reads as follows:

[2] Taken from the Facts on page 14 as stipulated on the Appeal to the Supreme Court of the United States.

"Section 7996. The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto." [3]

This is merely a codification of the common law in existence in Wisconsin as well as in most if not all of the states of the United States and to challenge this established concept is to challenge the very basic long established concepts of the law of our land. Where the validity of a statute is in question, it is a rule of law that it should always be resolved in favor of validity especially when it is a codification of the common law.

American Jurisprudence, Volume 17, section 58 states, that the doctrine that the children's domicil follows that of the father, rests upon the reciprocal rights and duties of the father and child.[4] It obtains that even though the parents may be living apart.[5] The fact that a married woman has in appropriate circumstances acquired a domicil different from that of her husband does not affect the domicil of minor children of the two born in lawful wedlock [6] in the absence of some neglect of parental duty on the part of the father [7] of his consent to their acquiring a residence elsewhere or of his own voluntary relinquishment [8] or of some provision of the statute.[9] It has been held however if compelled by her husband's desertion or misconduct to live separate and apart the domicil of the children follows that of the parent with whom they live.[10] Thus where a husband deserts his wife

[3] General Code of Ohio of 1910, page 1702. recodified as section 8002-2 *Ohio General Code*. 124 *Ohio Laws* 65.
[4] See *Glass vs. Glass*, 260 Mass. 562, 151 N.E. 621, 53 A.L.R. 1157.
[5] *Yarborough vs. Yarborough*, 290 U.S. 202, 54 S. Ct. 181.
[6] *Yarborough vs. Yarborough, Supra.*
[7] *Glass vs. Glass, Supra.*
[8] *Yarborough vs. Yarborough, Supra.*
[9] *Glass vs. Glass, Supra.*
[10] *Wear vs. Wear*, 130 Kan. 205, 72 A.L.R. 425.

and child it has been held that their domicil remains unchanged and the domicil of the child is not affected by a temporary visit to the father.[11]

The *Yarborough* case held that the domicil of a minor child of the parties to a divorce suit was that of her father and continued to be such until the entry of a consent decree making a settlement of temporary and permanent alimony including a provision for the support of the minor. In the *Glass* case, supra, it was held that a minor residing with his parents in one state who is taken by his mother into another state after the institution of divorce proceedings against her in the former one does not become an inhabitant of the latter state.

In *Lanning vs. Gregory*, 100 Tex. 310, 99 S.W. 542, it was held that notwithstanding an agreement between the parents upon their separation that the mother should have control of the child, the domicil of the infant follows that of his father.

In Re: *Adoption of Francis*, 49 O.L.A. 427, it was held [12] in an adoption proceeding, that where a Nevada divorce had been obtained by the mother, the child being at the time of the divorce in Ohio, and the father being resident of New York, the Nevada decree ordering support by the father and custody of the child to the mother, held to be null and void; and it further holds that where the child was taken from the father's domicile, without his consent and against his will, the child was legally domiciled in the State of New York with the father.

In the instant case although the children were taken into the State of Ohio with the father's knowledge and consent, their return was withheld against his will and

[11] *Wear vs. Wear*, *Supra*.

[12] I believe this case to be directly in point to the case at bar.

without his consent. Consequently the children's domicile remained in Wisconsin.

From all of this authority we come to the inevitable conclusion that the domicil of the minor children is always the domicil of that of the father unless he consents to a new domicil being established or unless a husband deserts his wife. In the case at bar it was the wife who left the husband and the domicil remained that of the husband. The record is clear that the father at no time relinquished his control over the custody of the children and it was the finding of the trial court that appellant's visit in Ohio was to be only temporary and that she would return to Wisconsin with the children.

Counsel for appellant cites the case of *Harisades vs. Shaugnessy*, 72 S. Ct. 512, contending that the Supreme Court in this recent decision may affect the jurisdictional significance of domicil. The Supreme Court in that case decided that the due process clause does not shield the citizen from conscription and separation from his family and friends and business while transported to foreign lands to stem the tide of Communism in spite of the fact that severe hardship was inflicted on individuals. This decision was reached in rejecting the claims of constitutional infringement where the basic contention of the appellant was that admission for permanent residence confers a "vested right" on the alien equal to that of the citizen to remain within the country and that the alien is entitled to constitutional protection in that matter to the same extent as the citizen. The case involved the Alien Registration Act of 1940 and there too it was argued that due process of law in violation of the 5th Amendment was denied the alien because he suffered personal hardship. So here appellant Mrs. May may suffer personal hardship by being separated from her children, which is

debatable,[13] but that does not in itself constitute a violation of the due process guarantee of the Constitution.

Appellant refers to *Halvey vs. Halvey*, 330 U.S. 610, 67 S. Ct. 903. That decision held that the full faith and credit clause was not violated since it was not shown or proven that the New York decree in modification of the Florida decree exceeded the limits permitted under the Florida law relative to the child's visitation and vacations with the father. That case did make clear the fact that states must give full faith and credit to their neighbor states but does not require them to do more. In *Davis vs. Davis*, 305 U.S. 32, that same principle is expounded; that full faith and credit must be given in each state to judicial proceedings of other states and applies to all courts Federal as well as State. Applying the facts to the case at bar, the Wisconsin decree must be upheld in all of the states of the United States by virtue of the full faith and credit clause and was so done by the Ohio courts.

Counsel for appellant argues long and with multitude of verbiage on lack of Wisconsin Court jurisdiction over the person of the Ohio defendant, but we find said issue completely irrelevant here. We are not concerned with the service necessary to the obtaining of a money judgment or matters involving lunatics or incompetents. We are here concerned over jurisdiction in divorce matters only. To determine the marital status of the parties, substituted service is sufficient. It would appear then that

[13] The Waukesha County Court, Wisconsin record is clear on its face that the mother of the children in this action did not want the children as indicated by her letter of January 2, 1947, which was admitted into evidence in which she stated, "I don't intend to take the kids from you. You can have them." In that same letter she had admitted her guilt and further stated, "You can send me whatever you want me to have if its nothing its more than I deserve."

only appellant's second question is material — and this question of domicile we have already taken up at some length.

In *Pennoyer vs. Neff*, 95 U.S. 714, the Court held that while the courts of the United States are not foreign tribunals of a different sovereignty and are bound to give a judgment of a state court only the same faith and credit to which it is entitled in the courts of another state; it was also held that substituted service by publication or in any other authorized form is sufficient to inform a non-resident of the object of the proceedings taken. Why did not appellant oppose the jurisdiction of the Wisconsin Court to determine the custody of the children by appearing specially to deny jurisdiction when she was apprised of such proceedings. Full faith and credit should be given to the Wisconsin decree under such circumstances for appellant had ample opportunity to appear specially or even to present evidence of her fitness as a mother.

In *Estin vs. Estin*, 344 U.S. 541, it was held that Nevada could not adjudicate the rights of the wife under a New York judgment where she was not personally served and did not appear in the Nevada proceeding. Since Nevada had no power to adjudicate the wife's rights in the New York judgment, New York need not give full faith and credit to any phase of Nevada's judgment. In the case at bar the Wisconsin court had jurisdiction of the res, or subject matter, by virtue of the domicil of the children in Wisconsin and therefore could adjudicate the rights of the children in the divorce action.[14] The children were domiciled in the State of Wisconsin at all times during which consent of the father was present; and a

[14] Decisions of County Court of Waukesha County, Probate Court of Ohio, and Court of Appeals of Ohio.

temporary leave from the State of Wisconsin would not deprive the children of their original domiciliary status.

Counsel for appellant continually uses the term "minor or incompetent." Minor children of parents before the Court in a divorce matter cannot be placed in said category. Notice need not be given minor children in a divorce action in Wisconsin and Wisconsin Courts can and do make orders pertaining to custody without service and without the children being named parties to the case. Jurisdiction over the children of the parties lies in the relationship of marriage and divorce and reasonable notice to the other party alone is sufficient. Counsel for appellant exhibits grave concern over the "slavery" of the situation. But can anyone say that appellant didn't have sufficient notice of said divorce proceedings? Or does counsel feel that children should be moved promiscuously from state to state to avoid the court's jurisdiction to the prejudice of the rights of the other party to the marriage? Let Counsel's fear be consoled — Wisconsin's unborn are not conveyed away! Due process is still very much the law and service on lunatics and incompetents is still the law of the state. And so is the law of domicile and substituted service still abided by? Here was good substituted service on the wife giving the Wisconsin Court complete jurisdiction of the divorce and the offspring thereof who were still domiciled in Wisconsin.

Mrs. May was not deprived of the privilege of moving her home from Wisconsin to Ohio. She was deprived of changing the domicil of the children from Wisconsin to Ohio. Since there was no neglect of parental duty on the part of the father nor voluntary relinquishment of the domicil of the children, nor consent to their acquiring a domicil elsewhere, this case clearly falls within the principles previously expounded. In the *Yarborough*

case, supra, and the host of other cases previously enumerated from American Jurisprudence, the desertion was not by the husband but by the wife which reinforces the argument that the domicil of the children was in fact never changed. The fact that they were minors and were not competent to change their domicil without the consent of the father coupled with the fact that the Wisconsin Court had jurisdiction to dispose of the children's custody was recognized by the Ohio courts in giving full faith and credit to the decision rendered by the Wisconsin court.

In effect, counsel for appellant is asking this Court to change the long standing rule that the husband is the head of the family and that he may choose any reasonable place or mode of living and the wife must conform thereto. If the Court were to assume such a position all precedent would be shattered and the marriage relationship itself would be placed in jeopardy. The wife could maintain that she was entitled to choose the place of living regardless of the fact that the husband is obligated to support her and may not be in a position to support his wife in another state. Appellant here is not asking the court for "equal protection of the laws" but is asking for "paramount and special protection of the laws." Marriage as a contract brings with it compensations and detriments, obligations and privileges, benefits and disadvantages, and such a contractual relationship does not deprive the wife of due process of law or equal protection of the laws merely because he is obligated to provide for her and conversely she must sacrifice a small part of her independence to him. So his domicile becomes her's and that of their children.

Counsel for appellant has perverted the meaning of the Contra-Jurisdictional statement submitted on behalf

of the appellee. Counsel states that the construction and application of the "due process" and "equal protection" clauses of the Fourteenth Amendment maintain and support the position of the appellant. The Contra-Jurisdictional statement that a wife, permanently separated or divorced from the husband, but having the children at the time of such separation or divorce would be entitled to establish the domicil of the children at such place that her place of abode was established, does not allow the inference that the appellee Anderson had either relinquished the right to determine the domicil of the children, or had given his consent to have a new domicil established by virtue of a separation agreement or divorce stipulation. Indeed by no other means could the mother change the domicil of the children.

The trial court of the State of Ohio following a sound course of reasoning in stating that since the father never consented to the children permanently leaving Wisconsin, the change of domicil by the mother was ineffective to change the domicil of the children.

The court further stated:

> "To say under these circumstances that the original Court lost jurisdiction to determine custody is to place a premium upon the taking of children from one state to another to avoid that court's jurisdiction." [15] Further, "that a court could be deprived of making a just and equitable order for the control, care, and education of minor children by the simple expedient of removing the children from the State. I do not believe that that is the meaning of the law." [16]

[15] Page a 9, Opinion of Probate Court of Ohio. (Unpublished)

[16] Page a 10, Opinion of Probate Court of Ohio. (Unpublished)

To carry argument of appellant to its logical conclusion would be to say that full faith and credit need never be given by another state to its sister state where children have been taken out of the state for the purpose of establishing a new domicil to defeat justice, by adjudication of the issues; that the father cannot establish the domicil for his children; and that the due process and equal protection amendments to the Constitution can be invoked to protect such wrongdoing on the part of the mother.

The Appellate Court of Ohio in supporting the Trial Court of Ohio stated that:

> "Two elements must concur to establish domicil—(1) residence, and (2) intention of remaining." [17] Further, "She brought them to Ohio on a temporary and conditional basis with the understanding that they should be returned if she decided to separate from her husband. She decided to separate and then it was that the temporary permission ended. Until she said to him over the phone on New Year's day of 1947, 'Owen I'm not coming back'." [18]
>
> "The children were domiciled in Wisconsin until December 26, 1946, *where the Wisconsin court had exclusive jurisdiction*, and that court did not *lose* its jurisdiction by reason of their going with their mother to Ohio to meditate and decide her program of life for the future. Temporary absence of the children from Wisconsin could not change their legal settlement. The Wisconsin court did not lose jurisdiction while they were temporarily in Ohio." [19]

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[17] Page *a* 17, Opinion of Court of Appeals of Ohio, Dec. 15, 1951. Also see *Anderson vs. May* (1952), 107 N.E. 2d 358, 62 Ohio Law Abst. 324, 48 Ohio Op. 132.

[18] Page *a* 17, Opinion of Court of Appeals of Ohio, Dec. 15, 1951. Also see *Anderson vs. May* (1952), 107 N.E. 2d 358, 62 Ohio Law Abst. 324, 48 Ohio Op. 132.

[19] Page *a* 17, Opinion of Court of Appeals of Ohio, Dec. 15, 1951. Also see *Anderson vs. May* (1952), 107 N.E. 2d 358, 62 Ohio Law Abst. 324, 48 Ohio Op. 132.

"The children were in Ohio with his consent and permission. After that announcement he demanded that she return the children which demand was ignored. The children from that time forward were in Ohio against his will and without his permission. It was during that period of time that the divorce proceedings were commenced and concluded. The change of domicil of the mother under these circumstances did not in any wise effect a change of the domicil of the children." [20]

In *Milliken vs. Meyer*, 311 U.S. 457, 61 S. Ct. 339, it was held that the responsibilities of state citizenship arise out of relationship to State which domicil creates, which relationship is not dissolved by mere absence from the state and attendant duties like rights and privileges incident to domicil are not dependent on continuous presence in the state, and one such incidence of "domicil" is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of proceedings against him. *U. S. C. A.* Const. Amend. 14. It was further held that if the judgment on its face appears to be a "record of a court of general jurisdiction", such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. *Adam vs. Saenger*, 303 U.S. at page 62, 58 S. Ct. at page 456. In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the principles on which the judgment is based. *Fauntleroy vs. Lum*, 210 U.S. 230, 28 S. Ct. 641. Whatever mistake of law may

[20] Page *a* 18, Opinion of Court of Appeals of Ohio, Dec. 15, 1951. Also see *Anderson vs. May* (1952), 107 N.E. 2d 358, 62 Ohio Law Abst. 324, 48 Ohio Op. 132.

underlie the judgment it is "conclusive as to all the media concludendi."

That case also cited *28 U. S. C. A.*, Section 687, which states the power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by Const. art. 4, section 1, and by the constitutional provisions authorizing legislation necessary and proper for executing the powers vested by the constitution and declaring the supremacy of the authority of the national government within constitutional limits. *Atchison, T. & S. F. R. Co. vs. Sowers*, 29 S. Ct. 397, 213 U.S. 55. This section prescribes a rule of evidence rather than one of jurisdiction.[21]

That case further held that the adequacy of substituted service on an absent defendant who has a domicile in state so far as "due process of law" is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of proceedings and an opportunity to be heard, and if it is, traditional notions of fair play and substantial justice implicit in "due process" are satisfied.[22] Wisconsin Statutes of 1949 provide:

Section 262.12:

> "When the summons cannot with due diligence be served within the state, the service of the summons may be made without the state or by publication upon a defendant when it appears from the verified com-

[21] Since application of the full faith and credit clause is a rule of evidence, great weight should be given to its application by the lower courts.

[22] The mother or guardian of the minor children was given due notice of the divorce proceedings and due notice, by the Complaint served, that custody of the children was demanded by the plaintiff husband, and did not challenge any of these proceedings by a *special appearance* which would not have jeopardized her jurisdictional challenge at a later date.

plaint that he is a necessary or proper party to an action or special proceeding as provided in section 262.13 in any of the following cases: (1) (2) (3) (4) (5) when the action is for divorce or for annulment of marriage."

Section 262.13:

"In the cases specified in Section 262.12 the plaintiff may, at his option, and in lieu of service by publication, cause to be delivered to any defendant personally without the state a copy of the summons and verified complaint or notice of object of action as the case may require, which delivery shall have the same effect as a completed publication and mailing."

Argument by counsel for appellant that the minor children should have been served with process in order to obtain jurisdiction of them is without merit since a minor cannot change his domicil, a relationship which can only be changed by the father except under certain circumstances such as desertion by him of his family or if the father consents to such change, or gives up his right to determine their domicil. Since the procedure in the State of Wisconsin does not require service of process upon a minor when the parents commence a divorce action but still the Court adjudicates the rights of such minor during such proceedings, then why should a minor have to be served with process to adjudicate his or her status when the parents reside in different states as counsel for appellant urges. Appellant's own Citations from *Restatement of Conflicts*, sections 117, 145, 146 and 149 and *27 Corpus Juris Secundum* 1163, bears out appellee's position. It seems that Counsel for appellant overlooks the fact that the Wisconsin Court followed the legal requirements for service and took testimony relative to the fitness of the individual parent prior to the making of its order and that the custody award was by no means arbitrary and capricious but was decided on the merits.

CONCLUSION

From the mass of authority cited it is obvious and apparent that the Waukesha County Court of the State of Wisconsin was within its jurisdiction since the children of the parties were there domiciled and properly awarded their custody to the father; for the children did not acquire another domicile and remained within its jurisdiction although the children were outside the state; that the 5th and 14th Amendments to the Constitution of the United States have not been violated or infringed and that Article IV, section 1 of the Constitution providing for "full faith and credit" to an adjudication by a sister state was properly recognized by all of the Courts of the State of Ohio and that the Supreme Court of the United States should affirm the lower Courts of Wisconsin and Ohio in awarding custody of the children to the father; "that no debatable constitutional question is involved."[23]

Should the Court in its sound discretion determine that debatable constitutional questions are involved then we submit they have been validly resolved and invoked by the lower courts so as not to deprive the appellant of due process of law or equal protection of the laws to infringe her constitutional rights.

Wherefore plaintiff appellee prays that the judgment of the lower courts be affirmed and the appeal by defendant appellant be dismissed and that appellee have his costs and disbursements, and for such other or further judgment or relief as may be just and equitable in the premises.

Respectfully submitted,

I. ENGLE,
Counsel for Appellee.

[23] Opinion of the Supreme Court of Ohio, April 2, 1952, in ordering Appeal dismissed, page *a* 19, also *Anderson vs. May* (1952), 157 Ohio St. 436, 105 N.E. 2d 648.